No. 19,325

In the United States Court of Appeals for the Ninth Circuit

SAFEWAY STORES, INCORPORATED; CONTINENTAL BAKING COMPANY; LANGENDORF UNITED BAKERIES, INC.; HANSEN BAKING COMPANY, INC., RICHARD HOYT; BUCHAN BAKING CO., and GEORGE B. BUCHAN, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

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BRIEF FOR RESPONDENT

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INDEX

	Page
Jurisdiction	1
Statement of the case	2
Proceedings before the Commission	2
Basic facts	5
Summary of argument	8
Argument	11
I. The Commission's finding that petitioners were parties to a price fixing conspiracy was proper	11
1. Substantial evidence in the record supports the Commission's finding that bread prices were tampered with, fixed and agreed to at meetings of Bakers of Washington, Inc.	14
2. Substantial evidence supports the finding that petitioners' trade association Bakers of Washington, Inc. was active in suppressing price competition on bread, and in securing adherence to establish bread prices, in the area of Bakers of Washington, Inc. membership	20
3. The Commission was justified in finding that petitioners were parties to the price fixing activities engaged in by their association Bakers of Washington, Inc.	28
4. The findings of the Commission where supported by substantial evidence, as they are in this proceeding, shall not be disturbed on review	37
5. Petitioners' arguments that the Commission relied only on "conscious parallelism," and that the activities of their trade association involved only "labor negotiations" and "collective bargaining," are unfounded	41

Argument—Continued Page

II. The Commission had jurisdiction over the price fixing conspiracy to which petitioners were parties 45

1. Sales of bread to Alaskan customers f.o.b. dockside at Seattle were sales in interstate commerce, and subjected the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission 45

2. Bread produced and sold within the State of Washington by integrated, multi-state corporations Continental, Langendorf and Safeway is sold in interstate commerce and any fixing of the price thereof is subject to the jurisdiction of § 5 of the Federal Trade Commission Act 49

3. An unlawful conspiracy between petitioners, Bakers of Washington, Inc., and others, fixing the price of bread in the State of Washington, is an unfair method of competition in interstate commerce regardless of whether or not petitioners' bread sales in the State of Washington are considered to be in interstate commerce 63

III. Petitioners were accorded a fair hearing before the Commission 66

1. The Commission could properly take official notice of facts about Continental established in a simultaneous proceeding before the Commission 66

2. The Commission properly found that in most particulars Continental failed to show the contrary of facts officially noticed 74

3. Chairman Dixon was not disqualified from participation in this proceeding 79

Argument—Continued Page

IV. The Commission properly entered an order prohibiting petitioners from engaging in price fixing activities in any of the areas in which they sold bread 85

Conclusion 90

TABLE OF CITATIONS

Cases:

Addyston Pipe & Steel Co. v. *United States,* 175 U.S. 211 (1899) 46
Advertising Specialty Nat'l Ass'n. v. *Federal Trade Commission,* 238 F.2d 108 (1st Cir. 1956) 3, 40
Allied Paper Mills v. *Federal Trade Commission,* 168 F.2d 600 (7th Cir. 1948), *cert. denied,* 336 U.S. 918 ..... 40, 43
American News Co. v. *Federal Trade Commission,* 300 F.2d 104 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 ..... 62, 88
American Tobacco Co. v. *United States,* 147 F.2d 93 (6th Cir. 1944), *aff'd,* 328 U.S. 781 (1946) ... 34, 39
American Trucking Associations, Inc. v. *Frisco Transportation Co.,* 358 U.S. 133 (1958) 71
Amos Treat & Co. v. *Securities and Exchange Commission,* 306 F.2d 260 (D.C. Cir. 1962) 83
Apex Hosiery Co. v. *Leader,* 310 U.S. 469 (1939) .. 47
Bankers Securities Corp. v. *Federal Trade Commission,* 297 F.2d 403 (3d Cir. 1961) 89
Bienville Water Supply Co. v. *Mobile,* 186 U.S. 212 (1901) 70
Brite Mfg. Co. v. *Federal Trade Commission,* 347 F.2d 477 (D.C. Cir. 1965) 73
California Rice Industry v. *Federal Trade Commission,* 102 F.2d 716 (9th Cir. 1939) 46, 65
Chicago Board of Trade v. *Olsen,* 262 U.S. 1 (1922) 62

Cases—Continued Page

Cole v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955) 42
Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591 (1948) 77
Continental Baking Co. v. *United States*, 281 F.2d 137 (6th Cir. 1960) 34
Corn Products Co. v. *Federal Trade Commission*, 324 U.S. 726 (1945) 37
Country Tweeds, Inc. v. *Federal Trade Commission*, 326 F.2d 144 (2d Cir. 1964) 89
Crichton v. *United States*, 56 F. Supp. 876 (S.D. N.Y. 1944), *aff'd*, 323 U.S. 684 69
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 46
Dance Freight Lines, Inc. v. *United States*, 149 F. Supp. 367 (E.D. Ky. 1957) 70
De Gorter v. *Federal Trade Commission*, 244 F.2d 270 (9th Cir. 1957) 38
Denison Mattress Factory v. *Spring-Air Company*, 308 F.2d 403 (5th Cir. 1962) 47
E. B. Muller v. *Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944) 73
Esco Corporation v. *United States*, 340 F.2d 1000 (9th Cir. 1965) 34, 38
Eugene Dietzgen Co. v. *Federal Trade Commission*, 142 F.2d 321 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 34
Federal Trade Commission v. *Algoma Lumber Co.*, 291 U.S. 67 (1934) 35, 38
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349 (1941) 53, 57, 64
Federal Trade Commission v. *Henry Broch & Co.*, 368 U.S. 360 (1962) 89
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 (1948) 30, 52, 64, 65, 80, 84
Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965) 86
Federal Trade Commission v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953) .. 53
Federal Trade Commission v. *National Lead Co.*, 352 U.S. 419 (1957) 85, 89

Cases—Continued Page

Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927) 37
Federal Trade Commission v. *R. F. Keppel & Bros.*, 291 U.S. 304 (1934) 53
Federal Trade Commission v. *Raladam Co.*, 283 U.S. 643 (1931) 53
Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470 (1952) 85, 89
Federal Trade Commission v. *Sun Oil Company*, 371 U.S. 505 (1963) 42
Federal Trade Commission v. *Tuttle*, 244 F.2d 605 (2d Cir. 1957), *cert. denied*, 354 U.S. 925.. 53
Ford Motor Co. v. *Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 55
Foremost Dairies, Inc. v. *Federal Trade Commission*, CCH 1965 Trade Cases ¶ 71,500 (5th Cir. 1965) 59, 86, 89
General Motors Corp. v. *Federal Trade Commission*, 114 F.2d 33 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941) 55
Gerardi v. *Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963) 40
Giant Food, Inc. v. *Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 88
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1924) ... 52
Glendenning v. *Ribicoff*, 213 F. Supp. 301 (W.D. Mo. 1962) 71
Globe Readers Service, Inc. v. *Federal Trade Commission*, 285 F.2d 692 (7th Cir. 1961) 38
Grand Union Co. v. *Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962) 88
Heald v. *United States*, 175 F.2d 878 (10th Cir. 1949), *cert. denied*, 338 U.S. 859 39
Hernandez v. *United States*, 300 F.2d 114 (9th Cir. 1962) 37
Hills Brothers v. *Federal Trade Commission*, 9 F.2d 481 (9th Cir. 1926), *cert. denied*, 270 U.S. 662 58

Cases—Continued Page

Hitchman Coal & Coke Co. v. *Mitchell,* 245 U.S. 229 (1917) 35
Holland Furnace Company v. *Federal Trade Commission,* 269 F.2d 203 (7th Cir. 1959), *cert. denied,* 361 U.S. 928 (1960) 57
Interstate Circuit, Inc. v. *United States,* 306 U.S. 208 (1939) 39
Isaacs v. *United States,* 301 F.2d 706 (8th Cir. 1962), *cert. denied,* 371 U.S. 818 37
Jacob Siegal Co. v. *Federal Trade Commission,* 327 U.S. 608 (1946) 85
Kithcart v. *Metropolitan Life Ins. Co.,* 88 F.2d 407 (8th Cir. 1937) 70
Kline v. *United States,* 41 F. Supp 577 (D. Neb. 1941) 73
Korber Hats, Inc. v. *Federal Trade Commission,* 311 F.2d 358 (1st Cir. 1962) 89
Las Vegas Merchant Plumbers Ass'n. v. *United States,* 210 F.2d 732 (9th Cir. 1954), *cert. denied,* 348 U.S. 817 60
Lewis v. *Shell Oil Co.,* 50 F. Supp. 547 (N.D. Ill. 1943) 58
Lieberthal v. *North Country Lanes, Inc.,* 332 F.2d 269 (2d Cir. 1964) 61
Louisiana Farmers Protective Union v. *Great A & P Tea Co.,* 131 F.2d 419 (8th Cir. 1942) ... 47
Lowe v. *McDonald,* 221 F.2d 228 (9th Cir. 1955) 70
Mandeville Island Farms v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948) 52
Marquette Cement Mfg. Co. v. *Federal Trade Commission,* 147 F.2d 589 (7th Cir. 1945), *aff'd,* 333 U.S. 683 (1948) 80
Maryland Baking Company v. *Federal Trade Commission,* 243 F.2d 716 (4th Cir. 1957) 86, 89
McDaniel v. *Celebrezze,* 217 F. Supp. 952 (D. Md. 1963), *aff'd,* 331 F.2d 426 (4th Cir. 1964) ... 71
Moore v. *Mead's Fine Bread Co.,* 348 U.S. 115 (1954) 52, 59
Myers v. *Shell Oil Co.,* 96 F. Supp. 671 (S.D. Cal. 1951) 58

Cases—Continued Page

National Fire Insurance Co. v. *Thompson*, 281 U.S. 331 (1930) 70
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426 (1941) 87
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956) 44
National Lead Company v. *Federal Trade Commission*, 227 F.2d 825 (7th Cir. 1955), *aff'd*, 352 U.S. 419 (1957) 39, 43
National Macaroni Manufacturers Association v. *Federal Trade Commission*, 345 F.2d 421 (7th Cir. 1965) 37, 38
Niresk Industries, Inc. v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 85
P. Saldutti & Son v. *United States*, 210 F. Supp. 307 (D. N.J. 1962) 70
Page v. *Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 60
Paramount Cap Mfg. Co. v. *National Labor Relations Board*, 260 F.2d 109 (8th Cir. 1958) 69, 70
Patterson v. *United States*, 222 Fed. 599 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 47
Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U.S. 146 (1940) 69
Progress Tailoring Co. v. *Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946) 55
R. H. Macy v. *Federal Trade Commission*, 326 F. 2d 445 (2d Cir. 1964) 88
Salt Producers Ass'n. v. *Federal Trade Commission*, 134 F.2d 354 (7th Cir. 1943) 65
Santa Cruz Co. v. *National Labor Relations Board*, 303 U.S. 453 (1937) 46
Shreveport Macaroni Mfg. Co., Inc. v. *Federal Trade Commission*, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964) 60
Standard Container Mfg. Ass'n. v. *Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941) 46, 59, 61
Standard Distributors v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954) 38

Cases—Continued Page

State of Wisconsin v. *Federal Power Commission*, 201 F.2d 183 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934 70
Stauffer Laboratories, Inc. v. *Federal Trade Commission*, 343 F.2d 75 (9th Cir. 1965) 35, 37
Steers v. *United States*, 192 Fed. 1 (6th Cir. 1911) 47
Swanee Paper Corp. v. *Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962) 88
Texaco, Inc. v. *Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964) 83
The Borden Company v. *Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964) 58, 59
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) 42
Times-Picayune Pub. Co. v. *United States*, 345 U.S. 594 (1952) 47, 48, 53
United Biscuit Company of America v. *Federal Trade Commission*, CCH 1965 Trade Cases ¶ 71,528 (7th Cir. 1965) 86
United States v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924) 72
United States v. *E. I. du Pont*, 353 U.S. 586 (1957) 51
United States v. *Frankfort Distilleries*, 324 U.S. 293 (1945) 52
United States v. *General Electric Company*, 80 F. Supp. 989 (S.D.N.Y. 1948) 44
United States v. *Learner Company*, 215 F. Supp 603 (D. Hawaii 1963) 48
United States v. *McKesson & Robbins*, 351 U.S. 305 (1955) 47, 61
United States v. *National Retail Lumber Dealers Ass'n*, 40 F. Supp. 448 (D. Col. 1941) 48
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 39
United States v. *Patten*, 226 U.S. 525 (1913) 44
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1945) 69, 72

Cases—Continued Page

United States v. *Pink*, 315 U.S. 203 (1942) 70
United States v. *Shubert*, 348 U.S. 222 (1954) 56
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 35, 39, 46, 61
United States v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) 52, 56, 82
United States v. *Swift & Company*, 196 U.S. 375 (1905) 62, 82
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 77
United States v. *Yellow Cab Co.*, 332 U.S. 218 (1946) 48
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 (1951) 38
Western Sugar Refining Co. v. *Federal Trade Commission*, 275 F. 725 (9th Cir. 1921) 73
Wickard v. *Filburn*, 317 U.S. 111 (1942) 65
Willard Dairy Corp. v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) 58
Yee Chun v. *Nagle*, 35 F.2d 839 (9th Cir. 1929) .. 69

Statutes:

Administrative Procedure Act:
Section 7(d), 60 Stat. 237, 5 U.S.C. § 1006 (d) 67, 68

Clayton Act:
Section 2(a), 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a) 58

Federal Trade Commission Act:
Section 5(a), 66 Stat. 632, 15 U.S.C. 45(a) .. 1, 52, 53, 58, 59
Section 5(c), 52 Stat. 112-3, 15 U.S.C. 45(c) .. 2, 90
Section 5(d), 72 Stat. 943, 15 U.S.C. 45(d) .. 2

Congressional References:

Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 68

Rules: Page

Federal Trade Commission Rules of Practice for Adjucative Proceedings, 16 C.F.R. (Supp. 1965):
Section 3.14(d) 68

Other Authorities:

Attorney General's Manual on the Administrative Procedure Act (1947) 68, 73, 75
Davis, *Administrative Law Treatise,* Vol. 2, p. 403 70
Davis, *Official Notice,* 62 Harv. Law Rev. 537 (1949) 67

In the United States Court of Appeals for the Ninth Circuit

No. 19,325

Safeway Stores, Incorporated; Continental Baking Company; Langendorf United Bakeries, Inc.; Hansen Baking Company, Inc., Richard Hoyt; Buchan Baking Co., and George B. Buchan, Petitioners

v.

Federal Trade Commission, Respondent

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

This case is before the Court upon petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of administrative proceedings on a complaint charging petitioners, among others, with violating § 5 of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. § 45, by fixing prices and suppressing price competition in the sale of bread.

JURISDICTION

The jurisdiction of the Commission is based upon the Federal Trade Commission Act, § 5(a)(1) and (6).[1] The

[1] Sections 5(a)(1) and (6) read:

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hearby declared

jurisdiction of the Court rests upon §§ 5(c) and (d) of the Act, the pertinent provisions of which are as follows:

> Sec. 5(c) Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the . . . court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used . . . by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive . . . [52 Stat. 112-3, 15 U.S.C. 45(c).]
>
> Sec. 5(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive. [72 Stat. 943, 15 U.S.C. 45(d).]

Petitioners all utilized the challenged practices within the jurisdictional area of this Court.

STATEMENT OF THE CASE

Proceedings before the Commission

In its complaint, issued March 7, 1961, the Commission charged that Continental Baking Company, Langendorf United Bakeries, Inc., Safeway Stores, Inc., Hansen Baking Co., Inc., Buchan Baking Co., Bakers of Washington, Inc. (a trade association), and others,[2] were

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unlawful." 66 Stat. 632, 15 U.S.C. 45(a)(1).

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. 45(a)(6).

[2] Petitioners were all named in the Commission's complaint. The Commission's proceeding, however, was not only against petitioners individually, but against all members of Bakers of Washington,

engaged in unfair acts and practices and unfair methods of competition in commerce by:

> . . . cooperating, combining, conspiring, agreeing and entering into understandings and following a planned common course of action to hinder, lessen, restrict and suppress competition among and between themselves and others in the production, distribution and sale of bread. [Para. EIGHT of Complaint, R. I, 6.] [3]

Additional specifications were set out in Paragraphs NINE, TEN and ELEVEN of the Commission's complaint. These paragraphs cited the use of Bakers of Washington, Inc. by petitioners and others as an instrument for suppressing price competition in the sale of bread, meetings of Bakers of Washington, Inc. (including petitioners) in Seattle at which bread prices were agreed upon, and the employment of Arthur H. Lalime, secretary-manager of Bakers of Washington, Inc., as an agent for suppressing bread price competition. Petitioners, except Safeway, all admitted to membership in Bakers of Washington, Inc. All denied engaging in the price fixing activities alleged, and all denied the jurisdiction of the Commission.

Inc., as a class. *Cf. Advertising Specialty Nat'l Ass'n.* v. *Federal Trade Commission,* 238 F.2d 108 (1st Cir. 1956). All members of the association were named in the Commission's order (R. II, 814-815, 985). The following coconspirators named in the complaint have not sought review: Bakers of Washington, Inc., Trennery's Bakery Co., Snyder's Bakery, Inc., John M. Larson, trading as Larson's Bakery, Vic H. Goethals, trading as Fortune's Bakery, and Holsum Baking Company. Arthur H. Lalime, the former secretary-manager of Bakers of Washington, Inc., also named in the complaint is now deceased, and was not mentioned in the order.

Buchan Baking Co., and George B. Buchan, president of Bakers of Washington, Inc., and of Buchan Baking Co., filed a petition for review June 5, 1964. By letter dated June 9, 1965, counsel for those two petitioners advised that he had been instructed "not to go forward" with their petition, but as far as we know the petition has not been withdrawn.

[3] "R" refers to reproduced transcript of record before the Court. Roman numerals indicate the volume, Arabic numerials show page.

Hearings were held[4] before an examiner who concluded after 73 numbered findings of fact that:

> The activities of respondents as set forth in the findings taken together add up to a conspiracy and combination on the part of respondents to fix prices and compel adherence to them and constitute unfair methods within the intent and meaning of Section 5 of the Federal Trade Commission Act. [R. I-A, 545.]

On appeal, the Commission sustained the hearing examiner and adopted the initial decision and order "as supplemented and modified" by its opinion issued February 28, 1964 (R. II, 813-866). The Commission in its decision took official notice of certain facts about Continental which were developed in another case before the Commission, *In the Matter of Continental Baking Company*, Docket 7630. These officially noticed facts related to the organization and conduct of Continental's multistate bread business from its New York headquarters. They had been derived from Continental's own executives and company records in Docket 7630. Continental objected to such official notice and on April 27, 1964, petitioned the Commission for "reconsideration or reopening" (R. II, 873). The Commission reopened the proceeding on May 21, 1964 to permit an opportunity to "show the contrary" of the facts officially noticed (R. II, 877). Continental then attempted through company witnesses to portray its Washington bread business as "local," and not controlled from New York headquarters. Upon the termination of proceedings on reopening the hearing examiner recommended that the Commission affirm its original judgment of February 28, 1964. The Commission did so, and on December 3, 1964, directed that the original order of February 28, 1964, "become effective forthwith" (R. II, 999). In the meantime Continental, on October 21, 1964, had moved to disqualify Chairman Dixon from any "consideration or participation in this

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[4] The Commission's attorneys subpoenaed 15 witnesses and introduced 30 exhibits. Petitioners offered no evidence.

proceeding." The alleged basis for disqualification was Chairman Dixon's participation in 1959, before his appointment to the Commission, in certain hearings of the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary, 86th Cong., 1st Sess., relating to "administered prices" in the bread industry. Chairman Dixon, however, after analyzing the legal and factual basis of Continental's motion, declined to disqualify himself (R. II, 913-922). The Commission's "Final Order" was issued simultaneously with its "Opinion After Reopening." Petitioners now seek review.

Basic facts

Bakers of Washington, Inc. was originally incorporated as Bakers of Western Washington, Inc., to "develop and promote better understanding and friendly association" among baking companies, and to employ such agents "as the business may require to coordinate the efforts of all those engaged in the baking industry for the promotion, development and conduct of the baking industry" (R. IV, 1000-04). The only office of Bakers of Washington, Inc. was located in Seattle (R. III, second page 34) and more than half its members had their places of business there (R. IV, 1025-27). The other members were located in the surrounding towns of western Washington particularly Aberdeen, Bellingham, Takoma, and Yakima, where divisions of the association were organized (R. IV, 1027). However, all dues were paid to Bakers of Washington, Inc. in Seattle (R. III, second page 34). Officials of petitioners Continental, Langendorf, Hansen Baking Co., Inc. and Buchan Baking Co. all held official positions in Bakers of Washington, Inc. (R. IV, 1018). Executives of Buchan and Hansen were president and vice-president respectively. A Continental official was on the "Executive Committee," and Langendorf was a "Trustee." Continental, Langendorf, Hansen and Buchan were also the leading baking companies in Seattle (R. III-A, 262; R. III-C, 57 near end of volume), and bore the largest pro-

portionate share of the financial burden of Bakers of Washington, Inc. (R. III, 78; R. IV, 1025).[5]

Continental has two baking plants in Seattle, one for bread and one for cake (R. III-B, 397). Plants are also maintained in Takoma and Spokane (R. III-B, 398, 401). Continental sells its bakery products "everywhere" in the State of Washington (R. III-B, 401). The Seattle plants of Continental, however, market their output principally in the western part of Washington (R. III-B, 397) although sales are made to Alaska (R. III-B, 397-398), and to the Continental plant in Portland, Oregon (R. III-B, 399). The Washington bakeries of Continental are part of a coast-to-coast baking complex with headquarters in New York, which had net sales in 1960 of $410,642,040 (R. IV, 1080).

Langendorf, like Continental, also conducts a multi-state baking business. Eleven plants are operated in all the major cities on the Pacific coast (R. I., 298; R. III-A, 312), and bakery products are marketed in California, Washington and Oregon. Two bakeries, a bread plant and a cake plant, are maintained in Seattle (R. III-A, 312). Bread and bakery products produced by these plants are shipped throughout the Puget Sound area, east to Yakima, Ellensburg, and Moses Lake in Washington, and to customers in Alaska (R. I, 252; R. III-A, 313, 343). Total net sales of bread and other bakery products by Langendorf amounted to $73,825,340 for the fiscal year ending in 1961, and 3,896 persons were then employed (R. I, 298, 299). Headquarters of Langendorf is in San Francisco, and the state of incorporation is Delaware.

Safeway is one of the nation's three largest operators of chain retail grocery stores (R. I, 301, 302). Safeway bakes and sells its own private label brand of bread, "Mrs. Wright's" (R. III, 152), but also sells "Wonder Bread," the "brand name" bread of Continental (R. III-A, 194).

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[5] Petitioner Safeway paid $600 annually directly to the secretary-manager of Bakers of Washington, Inc. (R. III, second page 32), and usually attended meetings (R. III, 80).

In contrast to the multi-state operations of Continental, Langendorf and Safeway, Buchan Baking Co. and Hansen Baking Co., Inc., operated plants only in the State of Washington. Buchan maintained four plants, one in Bellingham, two in Seattle, and one in Takoma (R. III-A, 179). Annual dollar volume in 1960 was about $4,000,000 (R. III-A, 180). Bread and bakery products were marketed throughout the Puget Sound area (R. I, 231), and shipments were made to customers in Alaska (R. III-A, 230). Hansen operated two bakeries, one in Seattle and one in Takoma (R. III-A, 288). Annual volume approximated $3,000,000. Hansen also marketed its bread and bakery products principally in the Puget Sound area, except for "small quantities" of bread sold to customers in Alaska (R. I, 214, 270).

The remaining baking companies named in the Commission's complaint were small concerns operating in Yakima and Bellingham, except for Holsum Baking Company. Holsum sold bread in Washington, including Yakima, from its plant in Lewiston, Idaho, after it acquired Trennery's bakery in Yakima [6] (R. I, 279-280). All, however, were members of Bakers of Washington, Inc.

Bakers of Washington, Inc. held regular meetings, usually weekly, although not necessarily so, at the Washington Athletic Club in Seattle (R. III, 81, 87, 92). Such meetings were generally luncheon gatherings, and after lunch there would be a discussion (R. III, 129-130). Attendance was normally between ten to fourteen bakers from the Seattle area (R. III, 92). Representatives of Continental, Langendorf, Safeway, Hansen and Buchan were regularly present (R. III, 80-82). Bread prices and price increases, labor matters, and other items of interest to the baking industry, were taken up at these informal weekly meetings (R. III-A, 189-190, 260-61; R. III-B, 488-489, 493). As will be seen, these price "discussions"

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[6] That sales in the State of Washington by this member of the alleged conspiracy were in interstate commerce is unquestioned by petitioners (R. I, 189; R. III, 21).

were not innocuous, innocent generalities as claimed by petitioners in their briefs to this Court. Bakers of Washington, Inc. meetings were also held in the "divisions," for example, in Bellingham and Yakima, "whenever something develops" (R. III, second page 36). The secretary-manager of Bakers visited these divisions frequently (R. III, second page 39). Bakers of Washington, Inc. and its officials repeatedly acted to stop bread price cutting and bread price "wars" throughout the area of its membership, including Bellingham and Yakima (R. III, 41-46; 50-57; R. III-A, 251-270; 282; R. III-B, 356-366; 374-388; 464-469; 475-483; 488-495; 513-519).

Bread prices of Continental, Langendorf, Hansen, and Buchan were identical on the standard one and one-half pound white loaf (R. IV, 1028, 1029, 1033, 1035-1039, 1042, 1044, 1048; R. III-A, 185, 194; R. III-B, 412). Price increases, moreover, were simultaneous, or essentially so. Thus, on July 22, 1957 Buchan and Langendorf both raised prices from 30¢ to 31¢ per loaf (R. IV, 1028, 1044, 1046). On August 11, 1958 Continental, Langendorf, Hansen and Buchan all made simultaneous and identical increases from 31¢ to 33¢ (R. IV, 1048, 1042, 1033, 1029). On September 19, 1960, Langendorf and Hansen both made increases from 33¢ to 34¢ (R. IV, 1046; R. III-B, 450), and were followed three days later by identical and simultaneous increases by Continental and Buchan (R. IV, 1075, 1028), likewise from 33¢ to 34¢. All price increases "stuck." There were no "false starts"; no one attempted to raise bread prices and had to rescind the increase (R. III-A, 237).

SUMMARY OF ARGUMENT

The Commission found that the activities of Bakers of Washington, Inc., its secretary-manager, and all of its members, including Continental, Langendorf, Buchan, and Hansen, and in addition Safeway, taken together "added up" to a combination and conspiracy to stabilize bread prices and to prevent price cutting on bread in the geo-

graphic area of the Bakers of Washington, Inc. membership. The findings of the Commission are supported by substantial evidence on the record as a whole. Petitioners cannot disassociate themselves from the uncontradicted proof of the price fixing activities of Bakers of Washington, Inc., its secretary-manager and officers. Petitioners, moreover, met together at weekly or biweekly gatherings at the Washington Athletic Club where price fixing discussions took place, not just "general discussions of economic conditions" in the "context of labor negotiations" (Cont. brief, 48).[7] Such price "discussions" at meetings of Bakers of Washington, Inc. furthermore cannot be separated from the price fixing activities, and the proselyting actions against price competition, of the full time manager of Bakers who customarily presided at Bakers meetings. The claim of Continental (brief, 57), Langendorf (brief, 33) and Safeway (brief, 30) that they knew nothing of, and did not authorize, the price fixing activities of the association's secretary-manager (Lalime, and before him Alford), or of the president (George B. Buchan) and the vice-president (Richard Hoyt) of Bakers, cannot be credited.[8] Relevant to this contention, for example, is the testimony of the manager of Bakers, Arthur H. Lalime,[9] who testified (R. III, second page 41) that he worked by personal contact, using "every persuasion" of which he was capable, against price competition among Bakers membership which included, of course,

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[7] For example, decisions among baking companies were made at such meetings to raise prices. In the words of the owner of a small bakery who attended, "they decided that we should have a raise in our bread" (R. III-A, 260). This is obviously a price fixing agreement, not a "general discussion of economic conditions."

[8] Even Hansen Baking Co. Inc. makes this contention (brief, 33), although the evidence shows Hansen's own secretary (Richard Hoyt) to have acted personally, with the representative of Bakers of Washington, Inc., obviously Lalime, to stop price cutting in Bellingham (R. III-B, 467-472).

[9] Arthur H. Lalime was hired to replace Harry Alford, deceased, who had held the position of manager of Bakers of Washington, Inc. for the prior 20 years (R. III, second page 7, 23).

petitioners. (Safeway in effect was a member of Bakers making a regular payment to the secretary-manager, and usually attending meetings, as earlier described.) For another example, George B. Buchan, one of petitioners and president of Bakers of Washington, Inc., personally took part in an effort to suppress price cutting in Bellingham (R. III-B, 467-471). It is therefore untrue that petitioners were implicated in Bakers price fixing activities because of "mere membership" in the association.

Contrary to the arguments of petitioners, the Commission had jurisdiction over the subject price fixing notwithstanding the bread involved was produced in Washington and principally sold therein, because: (a) sales of bread to Alaskan customers f.o.b. dockside at Seattle, as well as certain other interstate shipments, were sales in interstate commerce, and subjected the price fixing conspiracy to § 5 of the Federal Trade Commission Act; (b) price fixing in local markets by Continental, Langendorf, and Safeway, operating national or regional businesses on an integrated basis from out-of-state headquarters, and using all the instrumentalities of interstate commerce, is in interstate commerce subject to § 5; (c) a combination or conspiracy involving out-of-state corporations doing business in many states fixing the price of bread within the State of Washington is in interstate commerce subject to § 5.

Finally, it was proper for the Commission to take official notice of facts about Continental derived from Continental's own officials and records in another proceeding simultaneously before the Commission. In fact, § 7(d) of the Administrative Procedure Act specifically authorizes the use of official notice by administrative agencies such as the Commission. Nor was Chairman Dixon disqualified from participating in the proceedings after remand, or at any time. The Order entered by the Commission properly and reasonably prohibited petitioners from price fixing activities in each market where they sold bread, and under applicable precedents was an allowable exercise of the Commission's judgment.

ARGUMENT

I. The Commission's finding that petitioners were parties to a price fixing conspiracy was proper.

Before turning to the details of the proof of price fixing, a preliminary contention of petitioners should be answered. Continental (brief, 10, 58-59), and Langendorf and Hansen (brief, 8-9, 28) claim that as wholesale bakers they were not "concerned" with retail bread prices, and had no interest in them. This contention cannot stand scrutiny. Continental, Langendorf, Hansen and Buchan bake and sell their bread to retail outlets, typically supermarkets and grocery stores, who resell to the public. They are the principal wholesale bakers in the Puget Sound area (R. III-A, 262; R. III-C, second page 57). Safeway produces its own line of bakery products including bread, which it sells in its stores under the Safeway brand "Mrs. Wright's" (R. III, 152). Safeway, and other supermarkets, also carry the advertised brands of petitioner's bread, such as Continental's "Wonder Bread" (R. III-A, 194, 264). A 1¢ price differential on supermarket shelves between name brands like "Wonder Bread" and private label brands such as "Mrs. Wright's" has customarily existed in the industry (R. III-A, 209-211, 264; R. III-B, 476-477).

Continental, Langendorf, Hansen and Buchan stamp the resale price to the consumer on the bread wrapper (R. III-A, 206, 319-320; R. IV, 1029), and the price they receive for their bread from the retail store is 20% off the retail price printed on the wrapper. The Langendorf Seattle manager stated in an affidavit (R. I, 249) that the wholesale price was "retail price minus 20%." The Continental Seattle manager testified concerning wholesale prices:

> Q. Mr. Covington, when you bill your customers for bread that you sell them wholesale, how do you bill them?
>
> A. The regular retail price less 20 per cent. [R. III-B, 443.]

The president of Buchan Baking Co. testified that his bread price in 1956 was "30 cents, less 20%. That would make the wholesale price" (R. III-A, 181). In 1960 it was "34 cents, less 20%." The secretary-manager of Bakers of Washington, Inc. testified, as follows:

> Q. So that if bread is selling for 34 cents for a 1½ lb. loaf—they are selling it at 34 cents now, are they not?
>
> A. I think so.
>
> Q. Then the wholesalers give 20% off to the retailers?
>
> A. Yes. [R. III, second page 42.]

It is thus obvious that the retail price and the price Continental, Langendorf, Hansen and Buchan received for their bread were intimately related. A decline in the level of retail prices of bread in any market would be reflected in the wholesale price received by Continental, Langendorf, Hansen, and Buchan.[10] Hence, any successful attempt to stabilize or fix prices at the retail level would result in fixed prices at the wholesale level. It is further evident that the price of Safeway's private label bread likewise was tied to the retail price of brand name bread on the shelves of its stores, and available elsewhere in the area. Whether Safeway is dubbed a "retailer" (Safe. brief, 21), or is a type of wholesale baker for its own supermarkets, makes not a particle of difference so far as its interest in maintaining the level of retail bread prices is concerned.

Ordinary white bread is a standardized product (R. III, second 37; R. III-A, 199-200), and price cutting at the retail level in any area would have affected the profits of Continental, Safeway, Langendorf, Hansen, Buchan, and the other bakers in the area. As the Seattle manager of Langendorf testified:

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[10] All price quotations by Continental, Langendorf, Hansen and Buchan to supermarkets, and other retail customers, were in terms of the retail price to the public (R. IV, 1028, 1029, 1033, 1035-39, 1042, 1044, 1048) and were identical.

> . . . . For instance, down in Aberdeen last week, there was a supermarket advertising bread, two loaves for 29 cents, in-store bakery. That affects our business tremendously. [R. III-A, 317.]

Bread price cutting is likely to spread among markets geographically proximate. The president of the "Washington Retail Bakers Association," which maintains headquarters in Seattle, testified that price cutting could spread from one market to an adjacent market. This official owned and operated a retail bakery in Seattle. He testified that he was aware of the bread "price war" in 1959 in Bellingham, about 90 miles from Seattle, and feared it would spread to Seattle, as follows:

> Q. As president of that association, was your attention directed to the price war in Bellingham in 1959?
>
> A. We were aware of it, yes, sir.
>
> * * * *
>
> Q. Were you interested financially from the standpoint of the sale of your bread?
>
> A. I think I was, yes.
>
> Q. Why?
>
> A. I have to make a living in my own business. I don't want the price of my bread to go down.
>
> Q. Was there an overlap in the marketing area? Do you sell in Bellingham?
>
> A. No, sir. It might reflect in Seattle. [R. III, 140-141.]

The president of Buchan Baking Co., who was also president of Bakers of Washington, Inc., under examination by his own counsel, confirmed the foregoing testimony by stating his fears with respect to price cutting in the Yakima area:

> Q. Do you concern yourself with prices over there [Yakima]?
>
> A. No—well, of course. If they have a price war, I suppose we would be concerned, *we wouldn't like it too well because it might spread.* [R. III-A, 234, emphasis added.]

Thus, Continental, Langendorf, Hansen, Buchan and Safeway all had a direct economic interest in retail bread prices throughout the geographic area where Bakers of Washington, Inc. had members. The geographic area of Bakers of Washington, Inc. membership was western Washington including Yakima.[11] Price cutting anywhere in this area was of concern to Bakers of Washington, Inc., members thereof, and petitioners.

1. *Substantial evidence in the record supports the Commission's finding that bread prices were tampered with, fixed and agreed to at meetings of Bakers of Washington, Inc.*

As has been shown, Continental, Langendorf, Safeway, Hansen, and Buchan regularly attended frequent Bakers of Washington, Inc. meetings (R. III, 81-82).[12] In fact, Continental, Langendorf, Hansen and Buchan were on a special list kept in the office of Bakers of Washington, Inc. of those interested in being personally called and informed of every Seattle meeting (R. III-A, 175; R. IV, 1024). The Seattle division meets at the Washington Athletic

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[11] Bakers of Washington, Inc. was not "state wide in scope" as Continental's brief says (p. 14, n. 1). Forty-eight of its 49 members were located in western Washington (R. IV, 1025, 1027). In fact the name of the association was originally "Bakers of Western Washington" (R. IV, 1010). Nor was the Commission's complaint and evidence limited to the "Seattle, Washington market" as Continental also states (brief, 13). The complaint and evidence concerned price fixing in the entire area where Bakers of Washington, Inc. members sold bread, including cities beyond Seattle such as Bellingham and Yakima.

[12] Concerning Safeway, the manager of Bakers of Washington, Inc., who customarily presided at meetings, testified:

> Q. Does a representative of the Safeway organization attend meetings of the Bakers of Washington, Inc?
>
> A. Their labor relations man would on occasion during contract negotiations.
>
> Q. *What about their divisional bread man?*
>
> A. He would attend meetings.
>
> Q. He does regularly attend meetings?
>
> A. *Usually, not always.*
>
> [R. III, 80, emphasis added.]

Club (R. III, 92; R. III-A, 259). The manager of Bakers testified: "At times we have a meeting every week, not always every week" (R. III, second page 36). More than 26 meetings are held every year, but less than 52 (R. III, 114). Meetings of members in Bellingham, Aberdeen, Yakima and Takoma are also held from time to time. The manager of Bakers visited these divisions "[a]nytime something happens that would require it" (R. III, second page 38). The Seattle luncheon meetings at the Athletic Club were informal, and were set up for a small group (R. III, 92; R. III-B, 493).

In the summer of 1958 a meeting of the Bellingham Division of Bakers of Washington, Inc. was held. George B. Buchan, the president of Bakers and president of petitioner Buchan, was present, as well as the secretary of Hansen Baking Company (R. III-B, 466-467, 471-473), who was also vice-president of Bakers (R. IV, 1018). The owners of local Bellingham bakeries were also present including those of "Fortune's Bakery" and "Hall's Bakery" (R. III-B, 467, 471). The latter had been invited by "the representative of the Bakers of Washington, Inc." (R. III-B, 468-473). Price fixing activities took place at this meeting, participated in by petitioners Buchan and Hansen, and included a discussion of bread prices, the price increase that was about to take place, and an attempt to bring recalcitrant local bakers into line "pricewise." A witness, Robert Hall of Hall's Bakery, testified:

> Q. And can you tell us what transpired at that meeting?
>
> A. Discussion of prevailing prices, and the bread rise that was about to take place and—
>
> Q. Continue. Have you finished your answer?
>
> A. Yes.
>
> Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?
>
> A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow on line with the rest of the bakeries. [R. III-B, 467.]

After this meeting in Bellingham "[t]here was a price increase in bread" (R. III-B, 473).

Albert Pettersen, a former bakery supervisor for Albertson's Stores, Inc., a food chain, testified as to what transpired at meetings of Bakers of Washington, Inc., at the Washington Athletic Club in Seattle, also in the summer of 1958, shortly before the bread price increase on August 11, 1958:

> Q. . . . Do you recall attending any meetings at the Washington Athletic Club of the Bakers of Washington, Inc. in which prices were discussed, around that period?
>
> A. Yes, I did.
>
> Q. What would be the nature of the price discussion that you heard?
>
> A. Well we discussed the labor, we discussed our price of our material—flour, shortening, sugar. And labor had jumped so high that *they decided that we should have a raise in our bread.* From there we just took it and they said, "What do you think about certain prices?" and they kicked it around and, so that is as far as it went as long as I sat there. . . . [R. III-A, 260, emphasis added.]

After these meetings Pettersen testified that Bakers of Washington, Inc., informed him of a price increase to be made:

> Q. Did you receive information that prices were going up after this series of meetings?
>
> A. Yes, sir.
>
> Q. And how did you get that information?
>
> A. Well, I believe it was a form sent to us. Now I am not sure whether it was a form or he called me, Art Lalime called me. I don't know whether it was a paper or telephone call.
>
> Q. It was just the one instance when he called you or sent you a notice or was there more than one instance.

A. Well, there was more than one instance because *we weren't sure on different items to go up on, like on buns and specialty breads.* [R. III-A, 261, emphasis added.]

It is significant that on August 11, 1958 Continental, Langendorf, Hansen and Buchan all put into effect identical increases from 31¢ to 33¢ (R. IV, 1048, 1053, 1042, 1046, 1033, 1028-1029).

Mr. Harry H. Schafer, who had owned a small wholesale bakery in the City of Bellingham for 28 years (R. III-B, 487), who was a member of Bakers of Washington, Inc., and who attended meetings on occasion at the Athletic Club in Seattle, testified:

Q. Did you ever hear any discussions of prices or price rises when you were at a meeting of the Bakers of Washington, Inc.?

A. Yes, sir.

Q. What would be the circumstances of such discussions? Would they usually occur around labor contract periods or what?

A. That is the reason for raising 'em.

Q. The question was: Were those meetings around the period of the signing of the new contracts? Was that when you heard discussions of prices?

A. Sometimes before and after our contract was signed.

Q. Would you hear price discussions at other periods at these meetings or were they generally localized around the contract periods?

A. Mostly contract periods, yes.

Q. And what would be the nature of the discussions that you heard?

A. "Well we're going to use red ink if we don't do something about the bread price." [R. III-B, 489.]

Schafer, as the owner of a baking company, looked to Bakers of Washington, Inc. as the *bellwether for prices* (R. III-B, 491), as follows:

> Q. Was there someone looked to in those meetings to be the bellweather [sic] for prices?
>
> A. Well, usually the head of the Bureau [Bakers of Washington, Inc.] . . . . At that time it was Mr. Alford.

Schafer further testified as to price discussions at the meetings:

> Q. Were the price discussions that you heard when you were at meetings—were they by groups off at one end of a table or were they general, around the room so that everybody was listening to everybody else or how were they conducted?
>
> A. The luncheons were really not too large and I think we overheard everybody pretty well when they were discussing *what they were going to do*—or not what they were going to do but what they had to do, I'll say, on labor and profits. [R. III-B, 493, emphasis added.]

After a price cutting incident in Yakima, a meeting attended by "nearly all bakeries in the city of Yakima, including retail and wholesale" was held at the Chinook Hotel (R. III-B, 383). All members of Bakers of Washington, Inc. with plants in Yakima were present (R. III-B, 384-385). These were Snyder's Bakery, Inc., a "trustee" of Bakers (R. IV, 1018), Eddy Bakeries Company, Inc., Larson's Bakery, Sigman Food Stores, and Trennery's Bakery (R. IV, 1027). Continental, Langendorf and Safeway, of course, also marketed their bakery products in the Yakima area. The meeting discussed "coordinating the prices a little bit" (R. III-B, 385). Some of the retail bakers were having "trouble" because the wholesale bakers were selling "day old" bread at a discount. They expressed their feelings about this practice to the wholesalers "very definitely" (R. III-B, 386). Also price cutting was occurring in Yakima, "shooting prices" with price cuts which were "sometimes rather ridiculous" (R. III-B, 386). All present:

> agreed that we would not shoot prices on large white and large whole wheat, a pound and a half loaves, we wouldn't shoot the prices on those. [R. III-B, 386.]

The foregoing establishes beyond question that meetings of Bakers of Washington, Inc. were utilized to obtain agreement on price increases, and to stop price cutting. Discussions at such meetings were not limited to innocuous "generalities," as petitioners seek to convince this Court, and as they unsuccessfully sought to convince the hearing examiner and the Commission. As witness Pettersen stated under oath telling how the August 11, 1958 price increase came about: "*they decided that we should have a raise in our bread.*" Pettersen was a responsible official in charge of the bakery department of a large food chain, and his testimony has never been contradicted. Bread prices closely thereafter were raised by Continental, Langendorf, Hansen and Buchan. The testimony of witness Schafer also reveals that agreement on price increases occurred at meetings of Bakers of Washington, Inc. Schafer's testimony that the consensus of the baking executives present, "*we're going to use red ink if we don't do something about the bread price,*" clearly shows an unlawful understanding among them that bread prices were to be raised. Further, according to Schafer, the baking company representatives at these meetings discussed with each other "*what they were going to do*" on prices, and what they "*had*" to do to maintain "*profits.*" The testimony of witness Robert Hall shows "hard core" price fixing activities by officers of petitioners Buchan and Hansen. These officials went to Bellingham and discussed with local bakers at a meeting in Bellingham the "*bread rise that was about to take place,*" and sought to have a local price cutter "*join and follow on line with the rest of the bakeries.*" After the meeting in Bellingham "there was a price increase in bread" (R. III-B, 473).

Illegal tampering with price levels through an understanding and meeting of the minds is obvious from such evidence. Bread prices went up three times in western

Washington between 1957 and 1960 (R. III-A, 181, 237; R. I-A, 527). No increases were aborted (R. III-A, 237; R. III-B, 494). Any conformance to an agreed or jointly contemplated pattern of conduct will warrant an inference of conspiracy. *Esco Corporation* v. *United States*, 340 F.2d 1000, 1008 (9th Cir. 1965); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1947). The foregoing, while sufficient to support the Commission's findings, is, however, not all the evidence of price fixing by petitioners in this record.

2. Substantial evidence supports the finding that petitioners' trade association Bakers of Washington, Inc. was active in suppressing price competition on bread, and in securing adherence to established bread prices, in the area of the Bakers of Washington, Inc. membership.

In addition to the price fixing discussions at its meetings, Bakers of Washington, Inc. was energetic in preventing and stopping price cutting. Albert A. Pettersen testified that, as bakery products supervisor for Albertson's Stores, Inc., he once advertised raisin bread in the Seattle "Post-Intelligencer" at 19¢ per loaf (R. IV, 1032; R. III-A, 250-251) when the current selling price was 26¢ per loaf (R. III-A, 256). The "secretary-manager" of Bakers of Washington, Inc., telephoned him:

> A. . . . he said that he thought I should get my regular price for raisin bread instead of dropping the price of raisin bread to 19 cents.
>
> Q. What was the regular price, if you remember?
>
> A. I think it was 26 cents.
>
> Q. Did he call you more than once or what happened?
>
> A. Yes, I have been called about twice to three times.
>
> Q. What did you do about it?
>
> A. Well I told him that I would try and do something about it. But I don't think it is anybody's

business what the instore bakeries sell their bread for. It is an instore promotion. It's a specialty loaf of bread.

Q. Did you know Mr. Lalime personally?

A. Yes, sir.

Q. Did you at any time talk with him about this matter personally other than on the phone?

A. Just on the phone.

* * * *

Q. Tell us as much as you can remember of Mr. Lalime's approach to you on the subject. What did he say? What was his argument.

A. Well, he thought maybe we might have a bread war if I keep fooling around with the price of bread. [R. III-A, 255-57.]

On cross-examination by counsel for Bakers, Pettersen testified that Lalime told him that *another wholesale baking company had complained about the 19¢ price advertised by Albertson's* (R. III-A, 273-74).

Pettersen himself had also used Bakers of Washington, Inc. to cope with bread price-cutting in the City of Bellingham. His company had opened a new supermarket in Bellingham in 1959 and bread prices were "off-list" in the area. Pettersen testified:

Q. Did you do anything about this?

A. Well, I called the Washington Bakers Association, Mr. Art Lalime, and told him he had better do something about the price of bread up here.

Q. What did he say?

A. Well, he said he would. Otherwise I said, "I would do something to get my price down a little bit too but I couldn't meet that price but that I would have to drop it." [R. III-A, 258-59.]

* * * *

Q. Did he say anything to you with regard to going down?

> A. Well he told me, "No, don't you go down. You just wait and let me take care of this" [R. III-A, 259.]

Again, on cross-examination by counsel for Bakers and Lalime, Pettersen testified:

> Q. When you called Mr. Lalime regarding the price situation in Bellingham, what did you expect him to do about it?
>
> A. Well, *Mr. Lalime represents all the bakers* here in the State of Washington and *he is supposed to kind of keep us all in line*, to try to help us all out. That is his job, to keep [sic] the people that belong to the association and *to keep the prices up to where they belong.* [R. III-A, 273-74, emphasis added.]

Previously in 1957, some price-cutting on bread had broken out in Bellingham. Bennett A. Haggen, a supermarket owner with an in-store bakery, and two other local bakeries, began selling their own baked bread at "two for 45 cents" (R. III-B, 356-57). Haggen, however, was not selling the "advertised brands" of bread at cut prices (R. III-B, 370). Haggen testified that the secretary of Bakers of Washington, Inc. came to see him about this price cutting. Haggen, at that time, was either a member of Bakers or had shortly before withdrawn from membership (R. III-B, 363, 367). Haggen had not previously met Lalime who had only recently been hired as secretary-manager of Bakers (R. III-B, 366). Lalime introduced himself to Haggen (R. III-B, 357), stating that he was representing "Bakers of Washington" (R. III-B, 366), and they had a discussion as to bread prices (R. III-B, 358, 361), Haggen testified:

> We discussed the price of bread, I'd say, and fitted it in with our economics and we felt that we were selling it ridiculously cheap at two for 45 cents and that in order to make a profit, we would have to get a higher price on bread, yes. [R. III-B, 361.]

Shortly after Lalime's visit to Bellingham the price-cutting by "in-store" bakeries ceased (R. III-B, 366).

In November of 1959 a similar instance of price-cutting occurred in Bellingham (R. III, second page 42). Lalime admitted that he went up to Bellingham "specifically because of the price war" (R. III, second page 45). He visited "Haggen's Thriftway" which "was selling bread at far less than the prevailing market" (R. III, second page 44). Lalime *did all in his "power to persuade these people not to do so"* (R. III, second page 42), i.e., to stop price cutting. He also talked to the manager of "Clark's Supermarket" about price cutting:

> A. I pointed out that a price war was very uneconomical, that it would be disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos. [R. III, second page 46.]

Robert Hall, partner in a bakery in Bellingham, testified that he had never been a member of Bakers of Washington, Inc., but had been solicited to join three times. Hall testified as to what he was told when he was asked to join Bakers of Washington, Inc., as follows:

> Q. Were you ever solicited to become a member?
>
> A. Yes, personally three times.
>
> Q. When you were solicited, were any representations made to you as to the purpose of this organization?
>
> A. Yes. It said to make better labor relations, *to maintain prices* and generally better baking conditions.
>
> HEARING EXAMINER LYNCH: Who made these representations to you, Mr. Hall?
>
> THE WITNESS: The Bakers of Washington Association.
>
> HEARING EXAMINER LYNCH: I mean, that is a corporation; any particular individual?
>
> THE WITNESS: I have heard his name but I cannot call him by name to my own knowledge. I have heard it, Mr. Lalime or whatever it is. [R. III-B, 464, emphasis added.]

In 1958, Bakers of Washington, Inc. was trying to persuade the owner of Hall's Bakery in Bellingham to raise his bread prices to the level of the rest of the bakers (R. III-B, 467). Hall testified under cross-examination by Continental that Lalime tried to get him to raise his prices:

> Q. . . . Did Mr. Lalime ever tell you to get your prices up?
>
> A. Mr. Lalime told me that, for instance, if Wonder Bakery cared to bring up bread in Bellingham and sell it as an unbranded loaf of bread for 10 cents a loaf, what would that do for your business?
>
> Q. He never told you that Wonder Bakery was going to bring up 10-cent bread?
>
> A. He did not say they were going to, he said: "What if they did?" [R. III-B, 468.]

The other partner of Hall's Bakery, R. L. Hall, testified that Bakers of Washington, Inc., advised him when price increases were going to take place (R. III-B, 476). On cross-examination by counsel for Continental he testified:

> Q. I think I'm correct in understanding, sir, that you testified that Mr. Lalime had advised you of prospective price increases in Bellingham?
>
> A. He had.
>
> Q. And can you recall for us, sir, what his language was? Was he able to say to you in other words that as of a certain date the bakers are going to go up a certain price?
>
> A. He did.
>
> Q. Did he say that to you?
>
> A. He did say that.
>
> Q. Do you recall what he said precisely?
>
> A. Well, this one time I believe he came in and he said that the price of bread is going to go up on such and such a date and was wondering what we were going to do about it. And I said, "Well, my brother

and I would have to talk it over and decide between us whether we would go up or whether we would stay where it was." [R. III-B, 482-83.]

And further:

Q. And do I understand you to mean by that that he thought you could get your prices more in line with the other retail prices of the Bellingham market?

A. As my memory of the conversation goes he said to me: "There are several of the other stores now that are getting 32 cents a loaf and we are wondering if you couldn't come up at least to meet those fellows at 32 cents." [R. III-B, 482.]

Victor H. Goethals, owner of "Fortune's Bakery" at Anacortes, testified that in 1958 he raised his prices because he was "*told to go up*" by Bakers of Washington, Inc., who contacted him telling him to raise his prices (R. III, second page 51). Goethals was a member of Bakers of Washington, Inc. (R. III, second page 53). This contact was by telephone call from the manager of Bakers in Seattle. Goethals, who was then selling his bread 2¢ lower than his competitors, was told *to put his bread price up with the rest of the wholesalers* (R. III, second page 51). Goethals testified that he then raised his bread price 2¢ because he did not want a repetition of the trouble with Bakers of Washington, Inc. that he had had in 1957 (R. III, second page 54-55). In 1957 he had been subjected to pressure to raise prices. Bakers of Washington, Inc. had harassed him to go along with a bread price increase which had just been put in ffect in the area. Goethals testified:

Q. What trouble was that in 1957, will you describe it, please?

A. Well, quite a bit because I did not go up with the price at first and then after the pressure was brought on by Alford, I had to put my price up after everybody else had put the price up. [R. III, second page 55.]

Alford, as previously stated, was the secretary-manager of Bakers of Washington, Inc. who preceded Lalime. When Goethals was asked how Bakers could pressure him "out there" in Anacortes to raise his prices, he testified that the "machine bakeries" could undersell him and "break" him at any time (R. III, second page 55).[13]

Goethals received communications by mail from Bakers of Washington, Inc., telling him that bread prices were going to go up on a certain date. He testified on this point:

> Q. The question was: Did you get mail from Bakers of Washington?
>
> A. Yes, I did.
>
> Q. And I asked you the subject matter of the mail, what did it say?
>
> A. Saying that bread would go up on a certain date. [R. III, second page 54.]

Frank A. Maxeiner, who at the time of the hearings was a field representative for the Lutheran Bible Institute, had operated a Seattle bakery for about 21 years prior to April 30, 1960 (R. III-A, 281-282). He testified that he had been a member of Bakers of Washington, Inc., and that Harry Alford, then "secretary-manager" of Bakers had contacted him over the years by telephone *to tell him to raise his bread prices.* Maxeiner testified:

> Q. Did you know Mr. Harry Alford when he was connected with Bakers of Washington?
>
> A. Yes, I did.
>
> Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending price rises as to bread?
>
> A. Yes, he called on the phone.

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[13] Lower prices in a market like Anacortes affect the business of the larger bakers such as Continental and Langendorf "tremendously." The Seattle manager of Langendorf testified to this effect (R. III-A, 317).

Q. And did this happen on several occasions?

A. Yes, it did over the years.

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, *he would usually indicate that we were to advance the price of bread.* [R. III-A, 282, emphasis added.]

Instances of suppression of price-cutting on bread by members of Bakers of Washington, Inc. also occurred in Yakima. Vincent Kenneth Noga operated an in-store bakery in a supermarket at Union Gap near Yakima. In the summer of 1958 Noga reduced his price to 25¢ per loaf. He placed a sign in front of the supermarket with the price on it (R. III-B, 515). Noga's competition was Continental, Langendorf, Trennery's (later Holsum), Atkinson's Stores, Inc., Safeway, and others (R. III-B, 513). These companies were selling bread at the regular price of 33¢ per loaf (R. III-B, 514). Within a day of his price-cut (R. III-B, 516) Noga was visited by one of the owners of Snyder's Bakery, Inc., a "trustee" of Bakers of Washington, Inc., who told Noga to get his bread price back up, and to get in line with the rest of the bakeries. Noga was informed that a 1¢ differential was sufficient for his bread, and he should come up at least to 32¢ per loaf (R. III-B, 516). Noga related Snyder's message:

> Well, he told me to get my bread up, to get it in line with the rest of them; that he figured if they let us have a penny that was sufficient; that I should come up to at least 32 cents. [R. III-B, 516.]

On an earlier occasion, in the fall or late summer of 1957 in Yakima, Wayne Atkinson, who operated the "Old Holland Bakery," ran an advertisement in the Yakima paper offering a weekend special of 21¢ on the one and one-half pound white loaf (R. III-B, 377). Atkinson's "Old Holland Bakery" was a member of Bakers of Washington, Inc. (R. III-B, 392). The price Atkinson had

previously been charging was 31¢ (R. III-B, 376). Atkinson was immediately visited by the owners of Snyder's Bakery, Inc., who asked him if he "was trying to break the price of bread" (R. III-B, 377, 379). The Snyders told Atkinson that they had had a telephone call from Safeway in Seattle about the low bread price (R. III-B, 382A).[14] Atkinson testified:

> Q. Whom did the Snyders say had called them from Seattle, did they say?
>
> A. Yes, sir.
>
> Q. And who was it?
>
> A. Safeway.

After the visit from the Snyders, Atkinson raised his bread price to the original price before the reduction (R. III-B, 383).

3. *The Commission was justified in finding that petitioners were parties to the price fixing activities engaged in by their association Bakers of Washington, Inc.*

Continental, Langendorf, Hansen, and Buchan all held official positions in Bakers[15] (R. IV, 1018), and bore a

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[14] This testimony was admitted by the hearing examiner "as to the Snyder's" (R. III-B, 381).

[15] Petitioner Langendorf now claims the officials of Bakers of Washington, Inc., had no functions and the positions were mere "formalities" (brief, 19). As an example to the contrary, the president of Bakers, George B. Buchan, hired the association manager, Lalime, (R. III, second page 23), and Buchan's name was given to the applicants as the one to write to for an interview (R. III, second page 24). The hiring of the association manager (salary $12,000 per year) shows that when necessary the officials of Bakers had "functions," and the jobs were not mere "formalities." Further, as another example of active conduct, Buchan and Hoyt, the association president and vice-president, went to Bellingham and with Lalime attempted to bring a price-cutting baker into line (R. III-B, 467-472). Authority for Bakers of Washington, Inc., actions was, of course, centered in its officers and trustees who were responsible for its affairs, including the supervision of the association's hired managers, Alford and after him Lalime.

proportionally larger burden of its financial support (R. III, 78). Petitioner Safeway likewise helped to defray the cost of Bakers of Washington, Inc., by paying its full-time manager an annual sum of $600 (R. III, second page 32). As described, petitioners all attended meetings of Bakers regularly and frequently (R. III, 81-82; R. III-A, 225, 294, 315; R. III-B, 413-414). The president of Buchan "ordinarily" attended the Seattle meetings of Bakers at the Athletic Club (R. III-A, 225); he also attended divisional meetings in Takoma and Bellingham "on a number of occasions (R. III-A, 233). The president and owner of Hansen Baking Co. was "quite regular" in attending meetings (R. III-A, 294). The Seattle manager of Langendorf likewise attended "quite often" (R. III-A, 315). The Seattle manager of Continental also regularly attended meetings of Bakers (R. III, 81; R. III-B, 413-414), as did the Seattle representatives of Safeway, "usually" (R. III, 81).

Bakers of Washington, Inc. had functioned as the trade association of Continental, Langendorf, Safeway, Hansen, Buchan and other members of the baking industry for many years (R. IV, 1006-1009). The association, as noted, had employed the same full time manager, Harry Alford, for 20 years prior to November 15, 1957, when Arthur Lalime was hired after Alford's decease (R. III, second page 7). The record discloses that Bakers of Washington, Inc., and Alford, had engaged in the same type of activity in suppression of price competition in the sale of bread as Bakers of Washington, Inc. did with his successor Lalime.

Both Alford and Lalime, as managers, consistently acted to eliminate and suppress all price competition in the sale of bread in the geographic area where there were members of Bakers of Washington, Inc. They were energetic in securing adherence to price increases and to established prices. Lalime, who presided at Bakers of Washington, Inc. meetings, admitted his working "philosophy" against price competition [16] in the sale of bread:

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[16] Contrary to Continental's misleading statement (brief, 10), what is involved here is not merely a matter of Lalime's "personal

A. . . . I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that. How do you convey that recommendation?

A. By every persuasion that I am capable of stating.

* * * *

Q. Then how do you convey your philosophy to the membership?

A. By personal contact.

Q. What is it you say to them?

A. I tell them that a price war would be very devastating to the industry. The demands that we have from labor are extremely difficult to live with without having a sick industry on top of it. [R. III, second page 41.]

Lalime thus conceded that as association manager he worked among petitioners Continental, Langendorf, Safeway, Hansen and Buchan against price competition. Lalime's activities involved such actions as, in the words of a small bakery owner in Anacortes, "[*h*]*e said I should put the price of bread up with the rest of the wholesalers*" (R. III, second page 51). When Harry Alford was manager of Bakers of Washington, Inc., he had also similarly contacted this small baker in Anacortes [R. III, second page 50.]

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economic beliefs." Lalime was the key official of Bakers of Washington, Inc. He was hired by one of petitioners, was paid by petitioners and by Safeway, and presided over petitioners' regular meetings at which price fixing and price discussions took place. Lalime's determined opposition to price competition as the manager of petitioners' trade association is powerful and persuasive evidence of the price fixing conspiracy. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 706. There the Court, referring to a letter of a "trustee" of the Cement Institute which commented that the cement industry "cannot stand free competition," stated:

> The relevance of this statement indicating this Institute official's informed judgment is obvious.

The president of Buchan Baking Company, George B. Buchan, as noted, was one of the officers of Bakers of Washington, Inc., who had hired Arthur Lalime (R. III, second page 23). Safeway, which had paid Alford an annual retainer, continued such payment to Lalime (R. III, 80). Moreover, Richard Hoyt, an executive of petitioner Hansen and an official of Bakers as described, and George B. Buchan, were proven by this record to have journeyed to Bellingham and with the representative of Bakers of Washington, Inc., obviously Lalime, there to have acted to get local bakers to go along with a price increase, and to induce a price cutter to get "in line" (R. III-B, 467-471).

Lalime was very active. He visited the Bakers of Washington, Inc., division in Yakima 12 times a year (R. III, second page 38) or, in other words, approximately once every month. He visited the other divisions equally often (R. III, second page 39). Lalime thus, by his own admission, obviously worked by personal contact among members of Bakers in the divisions, as well as among petitioners attending Seattle meetings, to prevent, discourage and suppress price competition. His activities to suppress competition in Bellingham have been established in detail.

Petitioners unsuccessfully tried to elicit testimony from small bakery owners contacted by Lalime that they understood his price fixing activities were "on his own". Being unsuccessful in this attempt, petitioners now claim contrary testimony has no value (Cont. brief, 59). The owner of Hall's Bakery in Bellingham, under questioning by counsel for Continental, testified as to a visit of Lalime: "I couldn't say he was up there on his own, no . . ." (R. III-B, 480). Lalime came into this man's store and asked all about the "bread war," the reasons for it and who started it, and inquired about the "price that we had on the window" (R. III-B, 481). Lalime acted during the incident as the representative of industry members affiliated with Bakers, and was understood to be such:

> A. Well, as far as I'm concerned, he asked me to do these things, I mean, he was asking me about them

> and, of course, the only thing that I can go on, he was the representative for the Washington State Bakers Association and I had a talk with him and that's what he was there about. [R. III-B, 481.]

Another bakery owner, also under questioning by counsel for a respondent below, testified:

> Q. Did you not just testify in response to Mr. Warnke's question that Mr. Lalime did not tell you that he was representing any particular person or anybody but himself?
>
> A. How can he represent himself when he is working for the association?
>
> Q. I wish you would answer my question, sir. [R. III-A, 276.]

Again on cross-examination by counsel for Continental a question was posed to a former supervisor of Albertson's Stores, Inc., suggesting that the manager of Bakers might have been acting "on his own" in his attempts to stop bread price cutting. This witness also refused to agree to this idea and, indeed, testified to the exact contrary:

> Q. Now in your conversations with Mr. Lalime, with regard to this Bellingham retail price situation, did Mr. Lalime ever say that he was *acting for the wholesale bakers?*
>
> A. *Yes, he did.* He didn't have to tell me. I know he is. [R. III-A, 270, emphasis added.]

Thus, Lalime held himself out as the representative of the Washington baking industry, including its leaders Continental, Langendorf, Safeway, Hansen and Buchan. Bakers of Washington, Inc., and its managers, Lalime and Alford, were understood by members of the baking industry to represent both "the wholesale people and the retail people" (R. III-A, 275). When a manager of Bakers told baking companies of price increases to institute, it was understood "that was his job" (R. III, second page 62).

The contention that hired managers, Lalime and Alford, of Bakers of Washington, Inc., would, on their own

initiative without authorization and indeed without even informing petitioners who, as officers and trustees of Bakers were their superiors, by personal contact, telephone and mail, tamper with bread prices and suppress price competition, and travel to towns like Bellingham, contacting bakers, securing adherence to price increases and stopping price deviations, cannot seriously be entertained. Even if this incredible situation existed, it is impossible to believe that Continental, Langendorf and Safeway did not know of such activities. Representatives of Continental, Langendorf, and Safeway could not have met with each other, with Lalime and Alford, and with their colleagues, petitioners Buchan and Hoyt, who participated with Lalime in suppressing price cutting, at small gatherings in an informal setting, many times in each year, without becoming aware of such activities. As the owner of a small Seattle bakery testified succinctly: "*we hear, you know, everything that goes on*" (R. III, 140).

The Commission rightly rejected petitioners' contention. The Commission found that petitioners knew or should have known of the price fixing activities of Bakers of Washington, Inc., and its officials, and had either affirmatively approved of those activities or acquiesced in them (R. II, 858). This finding was based upon compelling facts and circumstances in the record and upon inferences reasonably and properly drawable therefrom, not on "mere membership" in Bakers, as petitioners misleadingly suggest (Cont. brief, 57; Lang. brief, 32-33). Whether or not Lalime and Alford had been given specific authority to engage in activities to prevent price cutting, or to secure adherence to price increases, or were even told when hired not to do so, is beside the point. The fact is that they *did* engage in such activities, and the Commission found petitioners "knew or should have known" [17].

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[17] Continental states there is no evidence that any of the wholesalers ever knew about price "flurries" among the "retailers" (brief, 58).

This is flatly incorrect because the evidence shows, as already set out, that Buchan and Hansen, the largest wholesalers in Seattle ex-

The complaint, moreover, charged petitioners with a combination and conspiracy with Bakers of Washington, Inc., and with Arthur Lalime, among others, to fix and tamper with bread prices. The evidence reviewed up to this point in this brief is ample to warrant the Commission's finding of such a combination between petitioners, Bakers of Washington, Inc., Lalime, and others. Meetings of petitioners, Bakers, and Lalime, at which prices were discussed and agreed to ("they decided that we should have a raise in our bread" (R. III-A, 260)) alone were sufficient to connect Lalime and petitioners in a conspiracy making his price fixing activities binding on all. *Continental Baking Co.* v. *United States*, 281 F.2d 137, 152 (6th Cir. 1960); *American Tobacco Co.* v. *United States*, 147 F.2d 93, 118 (6th Cir. 1944), *aff'd*, *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). Insofar as Lalime's activities are concerned, there is no requirement in conspiracy law "that each defendant or all defendants must have participated in each act or transaction" making up the conspiracy. *Esco Corporation* v. *United States*, *infra*, 340 F.2d at 1006; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F.2d 321, 331 (7th Cir. 1944), *cert. denied*, 323 U.S. 730; *American Tobacco Co.* v. *United States*, *supra*, at 118. A conspiracy, of course, creates an agency relation among its members, and every act performed by any member of the conspiracy in furtherance

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cept for Continental and Langendorf, *helped to deal with a price cutting episode in Bellingham* involving small "retail" bakers (R. III-B, 467-473). Furthermore, the attempt to separate petitioners from the price fixing activities of Lalime by suggesting such activities occurred only among "retailers" is completely misleading. First, petitioners as wholesalers were vitally interested in retail prices as has been shown earlier in this brief. (pp. 11-14) Second, the evidence shows price enforcement wherever deviations occurred. As a small wholesaler testified, *Lalime told him to put his price up with the "rest of the wholesalers"* (R. III, second page 51).

Nor were the two price cutting episodes in Bellingham the only instances of price fixing activities by Lalime, as erroneously stated by Continental (brief, 59). The record is replete with many price fixing activities over a long period of time by Lalime, and Alford before him, involving communications to bakers to complain of price deviations (R. III-A, 255; R. III, second page 51) and to tell them to raise prices (R. III-A, 282).

of its purposes is the act of all members of the conspiracy. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254 (1940).

Safeway attempts to persuade this Court that it seldom attended meetings of Bakers, and hence was not at any meetings where price discussions and agreements took place (brief, 17-20). Safeway says the hearing examiner found the Safeway representative attended infrequently. From the structure of the hearing examiner's sentence, the statement has the appearance of a typographical error (R. I-A, 522). Be that as it may, Lalime, who presided at meetings, and to whom Safeway paid $600 annually ($50 a month), stated under oath that the Safeway "divisional bread man" *usually* attended Seattle meetings (R. III, 80).[18] As the saying is, this witness "should know". This is the most credible testimony in the record on this point. The statement of the Continental representative is ambiguous, "not too" frequent attendance by Safeway (R. III-B, 446) which could, in fact, mean attendance frequently but not "too" frequently. Witness Schafer, who did not see Safeway at meetings, operated a bakery in Bellingham, only attending Seattle meetings himself "whenever it was convenient" (R. III-B, 488). Safeway offered no evidence on the point, or, like the other petitioners, at all for that matter.

On this state of the record, the Commission believed Lalime's testimony that Safeway "usually" was present (R. II, 861), and found as a fact that Safeway "regularly" attended (R. II, 856), and "participated in the Seattle price discussion meetings" (R. II, 858). The Commission's finding is supported by the most substantial evidence in the record, is reasonable, and was an exercise of the Commission's proper function as a fact finding body. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, 343 F.2d 75, 79-80 (9th Cir. 1965). In addition to usual attendance by the Safeway

[18] As distinguished from Safeway's "labor relations man".

"divisional bread man" at meetings of Bakers, and the regular payments to Alford and Lalime by Safeway, Safeway's participation in the conspiracy is revealed by other compelling evidence in this record. Thus, as described, a baker who was a member of Bakers of Washington, Inc., and who charged 2¢ less per loaf of bread than Safeway, testified that he received a telephone call from a person who identified himself as "a Safeway Store man" and was threatened, as follows:

> . . . he told me that he was a Safeway store man and that the price of bread should be brought up there or else we would probably get in a bread war with them. [R. III-B, 479.]

Significantly this contact was made in connection with a price cutting episode in Bellingham, which Lalime was at that time attempting to suppress (R. III-B, 481). Safeway contends that the party on the other end of the telephone connection was not proven to be in fact a Safeway representative (brief, 28). Witness Hall, a Bellingham baker, testified unequivocally, however, that the caller identified himself as "a Safeway store man" (R. III-B, 478 and 479). The hearing examiner refused to reject his testimony (R. III-B, 479) and, lacking any indication whatsoever to the contrary, the Commission could in its discretion reasonably infer that Hall had in fact "received a threatening phone call from Safeway." Other tell-tale signs exist in this record, moreover, showing the use of the economic power of the big baking companies to frighten small price cutters. For example, Snyder's Bakery in Yakima, the owner of which was a "trustee" of Bakers of Washington, Inc., threatened Noga, a small baker:

> . . . . And then he says "what would you do if we went down and had Safeway" he says, "now, they can meet competition, sell their bread for 15 cents or even 10 cents," he says "you know, you'd belly up." [R. III-B, 518.]

And Lalime, in attempting to bring a Bellingham baker in line, as already described, threatened him by asking

what would happen to his business if "Wonder Bakery" brought unbranded bread into his area for 10¢ a loaf (R. III-B, 468, see also R. III, second page 55). In sum, the Commission properly found Safeway part of the conspiracy. Even if the evidence were less convincing, it would still be sufficient because less evidence is needed to connect a particular defendant to a conspiracy than to establish the conspiracy in the first instance. *Isaacs* v. *United States*, 301 F.2d 706, 725 (8th Cir. 1962), *cert. denied*, 371 U.S. 818; *Hernandez* v. *United States*, 300 F.2d 114, 121-122 (9th Cir. 1962).

4. ***The findings of the Commission were supported by substantial evidence, as they are in this proceeding, shall not be disturbed on review.***

It is submitted that a thoughful consideration of this record permits no reasonable alternative to a conclusion that there was an actual agreement, a "meeting of the minds," or a tacit understanding, in short a "combination and conspiracy," among petitioners, Bakers of Washington, Inc., Lalime, and others to suppress price competition in the sale of bread. The Commission has so found, and it has long been settled that on review the weight to be given to the evidence, and the inferences to be drawn, are for the Commission to determine, not the courts. *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739 (1945); *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927). The findings of fact by the Commission, including whether petitioners engaged in a price-fixing agreement, if supported by substantial evidence, are conclusive. *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F.2d 421, 426 (7th Cir. 1965); *De Gorter* v. *Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957). The reviewing court will not substitute its judgment for that of the Commission. *De Gorter* v. *Federal Trade Commission*, *supra*, 244 F.2d at 273; *Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, *supra*, 343 F.2d at 79-80; *Federal Trade Commission* v.

Algoma Lumber Co., supra, 291 U.S. at 73. Nor does the possibility of drawing either of two inconsistent inferences from the evidence prevent the Commission from drawing one of them. *National Macaroni Manufacturers Association* v. *Federal Trade Commission, supra,* 345 F.2d at 427; *Standard Distributors* v. *Federal Trade Commission,* 211 F.2d 7, 12 (2d Cir. 1954); *Globe Readers Service, Inc.* v. *Federal Trade Commission,* 285 F.2d 692, 694 (7th Cir. 1961). As the Court said in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488 (1951):

> Nor does it [substantial evidence] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*

The substantial evidence upon which the Commission found an agreement, understanding and meeting of the minds among petitioners, Bakers of Washington, Inc., Lalime, and others to suppress price competition in the sale of bread is set out in detail in the Commission's Opinion (R. II, 817-866), and has been reviewed in this brief. As the hearing examiner put it, petitioners activities "add up" to a combination to "fix prices and compel adherence to them."[19] It is believed the evidence supporting this conclusion is not only substantial on the whole record, but virtually conclusive. At the very least the comment of this Court in *Esco Corporation* v. *United States,* 340 F.2d (9th Cir. 1965) 1007, 1000, is appropriate:

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[19] It is significant that *four* out of the *five* persons who weighed the evidence in this record found a price fixing agreement among petitioners. This preponderance of judgment demonstrates that the evidence supporting the findings of price fixing is indeed substantial. Further, as the Court indicated in *Universal Camera Corp.* v. *National Labor Relations Board, supra,* 340 U.S. at 496-497, the initial findings of an experienced hearing examiner who heard the witnesses carry weight in judging whether there is substantial evidence on the record as a whole in support of the findings ultimately made by the administrative tribunal.

> We do not say the foregoing illustration *compels* an inference in this case that the competitors' conduct constituted a price-fixing conspiracy, *including an agreement to so conspire,* but neither can we say, as a matter of law, that an inference of no agreement is compelled. As in so many other instances, it remains a question for the trier of fact to consider and determine what inference appeals to it (the jury) as most logical and persuasive, after it has heard all the evidence. . .

It has been long established that an exchange of words is unnecessary to find a conspiracy. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227 (1939). It is sufficient if there is a common design, understanding or meeting of the minds in an unlawful purpose. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). In a similar rationale the Tenth Circuit in *Heald* v. *United States*, 175 F.2d 878, 881 (1949), *cert. denied*, 338 U.S. 859, stated:

> . . . . conspiracies rarely, if ever, are established from direct evidence. Conspiracies by their very nature must generally be established in large part from conversations, admissions, conduct, and the natural inferences to be drawn therefrom, and it is sufficient if the circumstances, acts, and conduct of the parties are of such character that the minds of reasonable men can conclude therefrom that an unlawful agreement or understanding exists.

It scarcely needs stating that any tampering with the price structure through agreement whether it be to establish prices, to secure compliance with price increases, or to end price cutting by some members of an industry, is illegal *per se* and an unfair method of competition in violation of the Federal Trade Commission Act. *United States* v. *Socony-Vacuum Co.*, 310 U.S. 150, 218 (1940); *National Lead Company* v. *Federal Trade Commission*, 227 F.2d 825, 833-834 (7th Cir. 1955), *aff'd*, 352 U.S. 419 (1957); *Allied Paper Mills, et al.* v. *Federal Trade*

Commission, 168 F.2d 600, 605 (7th Cir. 1948), *cert. denied*, 336 U.S. 918.

In view of the substantial evidence of record in this case, the Commission was not required to accept the denials of petitioners that there was any concert of action, understanding, or meeting of the minds.[20] As the court said in *Advertising Specialty Nat'l Ass'n.* v. *Federal Trade Commission*, 238 F.2d 108, 115 (1st Cir. 1956):

> . . . nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that 'The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words.' . . ."

Likewise in *Gerardi* v. *Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196, 200-202 (9th Cir. 1963), this Court noted a jury in a price fixing case was not "obliged to accept as true" the denials of those charged.

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[20] It is obvious that in every contested case where price fixing was proven, those charged must have disclaimed it. Thus, Continental's suggestion (brief, 49, n. 1) that persuasive weight must be given to petitioner's denials is nonsense.

Surprisingly, the witness (Schafer) whose "unequivocal" testimony Continental says "buttressed" petitioners' denials actually gave testimony strongly probative of a price fixing conspiracy. He admitted that price discussions took place at Bakers of Washington, Inc. meetings. The essence of his testimony was that an agreement was reached by those present that they would have to "do something" about the price of bread or use "red ink" (R. III-B, 489). This shows unequivocally an understanding to raise prices. His answer that he did not "hear" an agreement (R. III-B, p. 489) obviously refers to an "exchange of words" which is not necessary to a conspiracy. Continental should derive little comfort from pages 499-500 (R. III-B, 499-500), also cited in its brief, 49, note 1. They contain such leading questions that in effect Continental, rather than the witness, testified with answers of no probative value. The earlier testimony of the witness shows that an "agreement" in his lay mind meant an "exchange of words" (R. III-B, 489). His earlier testimony also shows that the price "discussions" he heard at meetings, whether dubbed "general" or not, amounted to an unlawful understanding, or meeting of the minds, to raise prices.

5. ***Petitioners' arguments that the Commission relied only on "conscious parallelism," and that the activities of their trade association involved only "labor negotiations" and "collective bargaining," are unfounded.***

Continental and Langendorf both attempt to create the impression in their briefs that the Commission based its finding of price fixing principally on price identity and simultaneous price increases (Cont. brief, pp. 48, 51-56; Lang. brief, 29-31). They then devote many words to knocking down this "straw man" by arguing that evidence of parallel pricing alone cannot be taken to prove a conspiracy. Continental writes that the price similarity "relied" on by the Commission is "explicable" by objective economic facts, and the inferences of unlawful conduct drawn "from this evidence" are improper. Langendorf announces that it "is well settled that 'conscious parallelism' in behavior is not *per se* conspiratorial conduct" (brief, 30).

This, however, is a completely false issue. The Commission was very clear that it did not base its findings of conspiracy on identical prices and simultaneous increases, standing alone. The Commission stated:

> . . . . It should be noted at the outset that this is not a "conscious parallelism" case. It is a consciracy case. [R. II, 841.]

The Commission discussed in great detail in its opinion the many evidentiary factors, apart from uniformity, which it concluded revealed a price fixing agreement among petitioners and others. These have been described. They include frequent gatherings of petitioners at Bakers of Washington, Inc. meetings at which price discussions took place and, in fact, where agreements were reached; price increases following such association meetings; the "personal contact" work of the association manager Lalime among the members of Bakers of Washington, Inc., and other members of the industry, against price competition. They include the activities of Lalime, his predecessor, and other officials of Bakers in suppressing in-

stances of price cutting. Such evidence goes far beyond "conscious parallelism." Cases such as *Cole* v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), cited by petitioners, have no pertinence because the Commission grounded its finding on far more than price uniformity and simultaneous increases in prices.[21]

Nor did the Commission "exaggerate" the price uniformity prevailing among Continental, Langendorf, Hansen and Buchan, as Continental claims (brief, 51). *Prices were identical* on the standard one and one-half pound loaf. Continental's own manager in Seattle testified that he *could not get a penny more for his bread* than competitors such as Langendorf, Buchan, or Hansen (R. III-B, 412). The president of Buchan testified that prices on the standard loaves were "very much" in line with competitors, they were "quite standard," *identical* as a general rule (R. III-A, 185, 194). That Safeway sold its own private label bread "Mrs. Wright's" in its supermarkets for 1¢ per loaf less than Continental, Langendorf, Hansen, and Buchan is not inconsistent with the existence of an understanding among all petitioners to suppress price competition. A small differential between private label and brand name products is well known in our economy. See, *e.g.*, *Federal Trade Commission* v. *Sun Oil Company*, 371 U.S. 505, 508 (1963). Moreover, as the president of Buchan Baking Co. (also president of Bakers of Washington, Inc.) testified, the other baking companies did not have the economic power to undercut Safeway (R. III-A, 195). Absolute price uniformity in any event is not a requisite of a price fixing agreement or understanding where the record otherwise contains substantial evidence probative of an unlawful understand-

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[21] In the latter case, the Court did not hold that evidence of "conscious parallelism" was inadequate to establish an agreement, but that such evidence did not "conclusively" establish an agreement. It was therefore held that the lower court was correct in submitting the matter to the jury. 347 U.S. at 541-542.

ing among petitioners. *National Lead Company* v. *Federal Trade Commission, supra,* 227 F.2d at 833-834; *Allied Paper Mills* v. *Federal Trade Commission, supra,* 168 F.2d at 607.

Petitioners label the bread price "discussions" that admittedly took place at meetings of Bakers of Washington, Inc., as merely "general discussions of economic conditions and price levels" occurring "in the context of labor negotiations" [22] (Cont. brief, 48-50). The characterization of such discussions as innocuous generalities, however, is contrary to the record. The point, of course, in any event is not whether such price discussions were "general" or specific, but whether they amounted to an agreement, understanding, or meeting of the minds to fix or tamper with bread prices, or constitute evidence tending to prove, when added to other evidence in the record, the existence of such an agreement, understanding or meeting of the minds.

In this respect, the "discussions" reveal quite clearly an unlawful understanding among petitioners to raise bread prices. Otherwise they certainly constitute evidence from which, along with other evidence in the record, an agreement, understanding or meeting of the minds may be inferred. For example, as already set out, the bakery supervisor of Albertson's Food Stores, a large supermarket chain, testified that in 1958 at meetings of Bakers of Washington, Inc. "*they decided*" that "*we should have a raise in our bread*" (R. III-A, 260). The assemblage then "kicked it around," discussing various prices. Contrary to petitioners' characterization, the "discussions" plainly were quite specific. Subsequently Continental, Langendorf, Hansen and Buchan all raised their bread prices the same amounts, effective the same day (R. IV, 1048, 1042, 1033, 1035, 1039, 1028-1029). Obviously exchanges such as this among competitors can-

[22] Although Continental states (brief, 50) that Bakers of Washington, Inc. was formed "purely" for labor matters, such object was nowhere mentioned in its Articles of Incorporation (R. IV, 1000-03).

not be characterized as innocuous "general discussions of economic conditions and price levels." Likewise, an agreement among competitors at Bakers of Washington, Inc. meetings to "do something about the bread price" also goes far beyond any innocent "general" discussion of price levels or economic conditions (R. III-B, 489).

Price discussions among competitors at Bakers of Washington, Inc. meetings, moreover, cannot properly be segregated from the other price fixing activities of Bakers, its officers and its hired managers, Lalime and Alford. Thus, price discussions at meetings presided over by Lalime cannot, and should not, be considered apart from the efforts of Lalime to quell price competition among members of the baking industry. The incorrect, euphemistic description of the discussions as mere generalities is, of course, an attempt by petitioners to accomplish this result and to eliminate them from consideration as evidence of price fixing. It is elementary, however, that the evidence of a price fixing conspiracy is to be viewed as a whole, the integral parts thereof are not to be weeded out and examined separately. *United States* v. *Patten*, 226 U.S. 525, 544 (1913); *United States* v. *General Electric Company*, 80 F.Supp. 989, 1004 (S.D.N.Y. 1948).

In view of the unlawful character of the price "discussions" between petitioners, it is of no moment whether they occurred incidental to labor negotiations, or not.[23] Nevertheless, Continental's argument (brief, 49-50) that the price discussions occurred only as an incident to "collective bargaining," and "in resisting union demands" is factually contradicted by the evidence. Harry H. Schafer,

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[23] *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), provides no justification for price discussions and exchanges *among competitors*. That case merely held that an employer resisting a union demand for higher wages on the ground it could not afford to pay must substantiate such claim. Whatever may be justified in the way of price discussions in negotiations between an employer and a union, *Truitt* certainly provides no basis for price discussions *between petitioners*, and with other members of the baking industry.

the owner of a small wholesale bakery in Bellingham, who came down to Seattle and attended meetings when convenient, testified that the discussions of prices at Bakers of Washington, Inc. meetings occurred "*after*" the contract with the union had been signed, as well as before (R. III-B, 489). Obviously, evidence that price discussions took place among competitors *after* labor contracts had been signed is flatly at variance with Continental's contention that they only occurred during labor negotiations "in resisting union demands." Significant also in this connection is the testimony of the manager of Bakers of Washington, Inc. that not only did the Safeway "labor relations man" attend meetings, but also the Safeway "divisional bread man" was usually present (R. III, 80).

II. The Commission had jurisdiction over the price fixing conspiracy to which petitioners were parties.

1. *Sales of bread to Alaskan customers f.o.b. dockside at Seattle were sales in interstate commerce, and subjected the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission.*

Petitioners Continental, Langendorf, Hansen and Buchan, sold bread regularly to customers in Alaska, f.o.b. dockside at Seattle.[24] Such sales of Langendorf, for example, were $35,789 in 1960 (R. I, 250), and were made at "regular wholesale prices" (R. III-A, 344). Sales of bread to Alaskan customers f.o.b. dockside at Seattle were, of course, sales in interstate commerce. *California*

[24] In addition to such Alaskan sales other regular out-of-state shipments were made by Safeway and Snyder's Bakery, Inc. Safeway shipped bread from its Seattle plant to an adjoining state (R. I, 276) and Snyder, a wholesale baker in Yakima, sold bread to retailers in the State of Oregon (R. I, 177). On April 1, 1959, Trennery's Bakery Co. in Yakima was acquired by Holsum Baking Company. Thereafter all bread sold by Trennery's in Yakima was imported from Lewistown, Idaho (R. I-A, 368). Petitioners conceded in proceedings before the Commission that bread sold in Yakima was "in commerce" (R. III-C, 8, near end of volume; R. I, 189).

Rice Industry v. *Federal Trade Commission*, 102 F.2d 716, 718 (9th Cir. 1939); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 290 (1921); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 241 (1899); *Santa Cruz Co.* v. *Nat'l Labor Relations Bd.*, 303 U.S. 453, 463 (1937). Such sales, without more, subject the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission. *Standard Container Mfg. Ass'n* v. *Federal Trade Commission*, 119 F.2d 262, 265 (5th Cir. 1941). Langendorf (brief, 16-17) and Safeway (brief, 14), however, argue that Alaskan sales were *de minimis*, and must be disregarded as interstate transactions in determining whether petitioners' price fixing activities in the State of Washington were "in commerce." Continental, on the other hand, simply ignores sales f.o.b. Seattle to Alaskan customers by stating incorrectly that "none of the bread manufactured [in Seattle] was sold outside the state" (brief, 15), and that "none of the bread subject to the alleged conspiracy is sold across state lines" (brief, 8). To be sure, only by disregarding sales to Alaskan purchasers are petitioners able to argue that sales in Washington of bread produced in Washington are wholly "intrastate," and that price fixing activities connected therewith are not "in" commerce and subject to the Federal Trade Commission. Illustrative of petitioners' Alaskan sales were those of Langendorf which, as stated, amounted to $35,789 in 1960 (R. I, 250), and Hansen's which were about $30,000 annually (R. III-C, 54 near end of volume).

The amount of interstate commerce involved is not material to a determination whether a restraint of trade such as price fixing is actionable under the antitrust laws. In *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225, the Court commented in assessing a challenged restraint:

> . . . the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U.S. 38), since § 1 of the Act brands as illegal

> the character of the restraint not the amount of commerce affected.

In fact, as early as 1903 in the *Montague* case, cited in the foregoing quotation, the Supreme Sourt was confronted by a claim that the amount of interstate commerce involved in an alleged restraint was "negligible," being *less* than 1% of the business of defendants. The Court rejected this argument, remarking that the amount of trade in a commodity was not "very material" in determining whether there was a restraint of interstate commerce. 193 U.S. at 46. More than fifty years later, in *United States* v. *McKesson & Robbins*, 351 U.S. 305, 310 (1955), the Court reiterated this position, stating:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small;* or whether the effect of the agreement is to raise or lower prices. [Emphasis added.]

See also: *Patterson* v. *United States*, 222 Fed. 599, 618 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (extent of interstate trade immaterial, no act of interstate commerce not protected); *Steers* v. *United States*, 192 Fed. 1, 5 (6th Cir. 1911) (no justification for view that a restraint can be permitted because volume of interstate traffic is not great); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485 (1939) (amount of interstate commerce not test of violation); *Louisiana Farmers Protective Union* v. *Great A & P Tea Co.*, 131 F.2d 419 (8th Cir. 1942) (it is the character of restraint denounced by antitrust laws, and the amount of interstate commerce involved is not material); *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 611 (1952) (unreasonable restraints are banned irrespective of the amount of commerce involved); *Denison Mattress Factory* v. *Spring-Air Company*, 308 F.2d 403, 411 (5th Cir. 1962) (price fixing is in violation of the

antitrust laws whether the amount of commerce affected is large or small); *United States* v. *National Retail Lumber Dealers Ass'n*, 40 F. Supp. 448, 458 (D. Col. 1941) (the extent of interstate trade conspired against is immaterial, conspiracy to restrain single interstate shipment is within Act); *United States* v. *Learner Company*, 215 F. Supp. 603 (D. Hawaii 1963) (a conspiracy to fix prices is a *per se* violation if it affects interstate trade, amount of interstate trade is immaterial); and *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225 (1946), where the Court stated:

> But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints of interstate commerce, regardless of the amount of the commerce affected.

Section 5 of the Federal Trade Commission Act minimally registers all violations of the Sherman Act. *Times-Picayune Pub. Co.* v. *United States*, *supra*, 345 U.S. at 609. The amount of interstate shipments, once such shipments have been established in fact, is thus likewise immaterial to jurisdiction under Section 5.

Furthermore, it cannot be said as a factual matter that $35,789 of annual sales by Langendorf or $30,000 of sales by Hansen directly "in" interstate commerce to Alaska, as well as comparable Alaskan sales of Continental and Buchan, were insubstantial, insignificant, or in any sense *de minimis*. In fact, the Commission found the opposite, that such sales were not *de minimis* (R. II, 821).

Langendorf states that petitioners did not have "a sufficient interest in the Alaskan market to have caused them to conspire to raise prices in that state" (brief, 17). The implication of this presumably is that sales of bread to Alaska f.o.b. dockside at Seattle were "outside" the alleged price fixing conspiracy, and jurisdiction cannot be based thereon. Continental also implies this argument by stating incorrectly (brief, 8) that "none of the bread subject to the alleged conspiracy is sold across state lines."

That the price fixing activities of Continental, Langendorf, Safeway, Hansen, Buchan, and Bakers of Washington, Inc. did not control the retail bread price in Alaska does not mean that sales to Alaskan purchasers f.o.b. at Seattle were "outside" the conspiracy. Alaskan sales were made by petitioners at their "regular wholesale prices" (R. III-A, 344). Obviously the price fixing activities of petitioners protected the price at which such sales were made just as such activities protected petitioners' bread prices to customers in Washington. Deterioration of prices in Washington would, of course, have meant a decline in the price petitioners obtained for their f.o.b. dockside sales at Seattle. Conversely, a cut price extended to Alaskan purchasers at the dock would have undermined the price structure with respect to petitioners' sales to customers in Washington. Hence, petitioners' sales f.o.b. dock at Seattle to purchasers in Alaska were sales "in" commerce at prices affected, tampered with, or inflated by petitioners' price fixing activities, and were not "outside" the conspiracy.

2. Bread produced and sold within the State of Washington by integrated, multi-state corporations Continental, Langendorf and Safeway is sold in interstate commerce and any fixing of the price thereof is subject to the jurisdiction of § 5 of the Federal Trade Commission Act.

Petitioners concede that they are engaged in interstate commerce, but argue that the price fixing activities challenged by the Commission were in the "intrastate" phase of their operations.[25] As described, petitioners first eliminate their Alaskan sales as *de minimis*, and then argue that the challenged price fixing activities concerned only bread produced and sold within Washington, and are therefore outside the jurisdiction of the Commission

[25] Continental stipulated that it "is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products" (R. I, 304). See similar stipulation of Langendorf (R. I, 299) and of Safeway (R. I, 302-303).

(Cont. brief, 13-22; Lang. brief, 10-18; Safe. brief, 45). Continental, Langendorf, and Safeway, in this manner, seek to derive all the advantages of large-scale interstate operations, but at the same time to free themselves from the antitrust laws customarily applicable thereto.

Continental, thus, would have this Court, in considering its pricing practices in Washington, close its eyes to the fact that they are part of a massive interstate baking operation consisting of 69 bakeries in 65 cities in 32 states, which did $410,642,000 in business nationally in 1960. From headquarters in New York Continental manages its far-flung operations on an intergrated basis. Indeed, *Continental stipulated that each element of its bread and bakery business is part of an integrated whole* (R. I, 304-305). Continental concedes it is a single business entity and that, as such, it benefits or suffers from what is done in the State of Washington. It cannot be disputed that Continental from headquarters maintains close scrutiny and supervision over its entire multistate operation, including, of course, supervision over *sales*, *profits* and *prices* of local plants such as those in Seattle. Under the president and his staff at New York, the company is divided into "regions," each under a "regional manager" responsible to the president for supervision of individual baking plants. The latter, headed by "plant managers," are responsible to the "regional managers" and finally to headquarters. Continental ultimately sells its bakery products, including bread, from its many plants by means of driver-salesmen. These Continental employees call on customers placing "Wonder Bread" on the shelves, collecting payments, and otherwise performing many essential tasks for the benefit of Continental.

Headquarters of Continental in New York has absolute authority over the entire Continental organization. Whatever operating procedures top management deems advisable may be instituted. Headquarters can determine in what geographic area any given plant will market its bread or, for that matter, can close any plant if it

wishes. Purchasing of raw materials is handled centrally in New York, and is done for the company as a whole (R. I, 305). Headquarters insists upon minimum standards of quality and guides production methods through production bulletins issued from New York. Regional supervision is also applied. All price changes by individual plants of Continental are approved by headquarters (R. IV, 1050-1071), and headquarters collects from its individual plants all money received from operations (R. I, 305). Continental's local plants have no control whatsoever over the money obtained from the sale of Continental's products. Personnel of Continental are shifted around the country from plant to plant, and from headquarters to regional office and plant, and vice versa. Headquarters, of course, may "fire" Seattle employees, as well as those at any level of Continental's organization, and has complete authority over them insofar as company business decisions are concerned.

There is thus a constant flow of communications, instructions, personnel, bulletins, reports, orders and so forth, between Continental headquarters, its regional offices, and local plants such as those in Seattle. Money from sales of bread and bakery products constantly flows out of the State of Washington back to the Continental treasury, and is disbursed in company operations and in dividends (R. IV, 1087). Funds likewise constantly flow from headquarters in New York to Seattle, and elsewhere, in payment for supplies for Continental's bakery products, and for other purposes.

The foregoing, of course, is not a complete enumeration of the manifold details illustrating the operation of Continental as a national interstate, integrated bakery business.[26] It serves only to emphasize the unreality of Continental's position that its business in Washington was merely "local," not in interstate commerce. This nar-

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[26] Continental Baking Company in 1963 ranked as the 121st largest United States industrial corporation with sales of $476,043,000. See Fortune directory, *"The 500 Largest Industrial Corporations"*, August 1964, p. 6. *Cf. United States* v. *E. I. duPont,* 353 U.S. 586 (1957), n. 17.

row interpretation limiting interstate commerce in this proceeding to the sale of bread across state lines, however, is not even consistent with the earliest Supreme Court pronouncement as to the meaning of the word "commerce." In 1824 Chief Justice Marshall defined "commerce" broadly to include not merely physical movement of goods, but commercial *intercourse*. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 188 (1924), he stated:

> Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

Continental plainly is engaged in "commercial intercourse" among the states when it sells bread in the State of Washington.

There has been a consistent refusal by the Supreme Court to exclude from the jurisdiction of the antitrust laws "local" predatory practices, such as price fixing, on the basis of an alleged "intrastate" character, where such practices are carried out by great interstate businesses, or are part of an interstate combine. This has been true whether the conclusion of jurisdiction has been formulated in terms of an "effect" on interstate commerce, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (1945), or on the basis of a determination that the "local" practices were "in" interstate commerce, as in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). It has also been true whether the action has been initiated under the Sherman Act or pursuant to § 5 of the Federal Trade Commission Act, *Federal Trade Commission* v. *Cement Institute, et al., supra*, 333 U.S. at 695-696, or under the Clayton Act, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).[27] In *Mead*, the Court held that local preda-

[27] Every trade restraint violative of the Sherman Act falls within the jurisdiction of § 5 of the Federal Trade Commission Act. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 691-692

tory pricing of an interstate business was "within the scope of the antitrust laws." The Court refused to consider bread produced in New Mexico and sold in the New Mexican town of Santa Rosa as a thing apart from the business of the Mead company as a whole. Mead was one of several "interlocked companies," a member of an "interstate combine." The Court remarked that the beneficiary of the predatory pricing was an interstate business, that the money used to finance the price cutting was drawn from interstate commerce, and concluded that if the local pricing practices of Mead were exempted from the operation of the antitrust laws the "pattern for growth of monoply would be simple." [28] In *South-Eastern*

(1948); *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304, 310 (1934); *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 647 (1931). § 5 "minimally . . . registers violations of the Clayton and Sherman Acts." *Times-Picayune* v. *United States, supra*, at 609. With respect to trade restraints, such as price fixing, the Sherman Act and the Federal Trade Commission Act provide the Government with "cumulative" remedies. *Federal Trade Commission* v. *Cement Institute*, at 694. In the field of trade restraints, the "Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, to stop in their incipiency acts and practices which, when full blown, would violate those acts." *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-395 (1953).

Consistent with these Supreme Court determinations, in a Sherman Act violation, such as price fixing, the jurisdiction of § 5 over interstate commerce must reach as far as that of the Sherman Act. Any other result would be anomalous, and contrary to the intention of Congress in passing the Federal Trade Commission Act to supplement the Sherman Act. In *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941), only the sale of "break and take" candy was involved, not a violation of the Sherman Act.

For jurisdiction in a price fixing case to be lacking merely because the proceeding was initiated under § 5 rather than by the Department of Justice under the Sherman Act would be contrary to the legislative purpose, and irrational. The policy and purpose of the Federal Trade Commission Act, in supplementing and bolstering the Sherman Act, must be considered in construing the powers given the Commission to function under it. *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605, 615 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957).

[28] *Mead* is directly applicable to the instant proceeding. Continental, Langendorf and Safeway, multi-state businesses, were the

Underwriters the Supreme Court rejected an argument by large insurance companies, operating like Continental in many states, that insurance sales made locally were "intrastate." The Supreme Court said:

> This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. [322 U.S. at 541.]

Further, the Court noted with specific reference to the technical claim that the sale of insurance was "local" and not interstate commerce:

> But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. . . . . We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute commerce. . . . . But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. [322 U.S. at 546-547.]

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beneficiaries of "local" price fixing in Washington just as Mead was of the "local" predatory price cutting in New Mexico. If Mead could finance local price cutting from a central treasury, Continental, Langendorf, and Safeway had available at all times, *vis-a-vis* small Washington bakers, the intimidating power and resources of their multi-state businesses in furtherance of price fixing. Petitioners' out-of-state sales, moreover, seem to have been relatively greater, if anything, than Mead's few sales in Texas from its plant in New Mexico.

The Court decided that an interstate business was not deprived of its interstate commerce character merely because it was built upon sales contracts which were "local." The business of insurance companies, culminating in a transaction between an agent and a member of the public, was viewed by the Court as a totality.

Similarly, the interstate bakery business of Continental must be viewed as a *totality*.[29] The production and sale of bread by the Washington plants of Continental could not have occurred and continued but for extensive interstate transactions. For example, if headquarters in New York stopped ordering and paying for flour for Continental's Seattle plants, they would obviously cease production. Exactly as in insurance sales, money collected by Continental from its bread sales in Washington flows back to a single treasury in New York. The channels and instrumentalities of interstate commerce including telephone, telegraph, mail and traveling agents were used to consummate "local" insurance sales the Court found to be in interstate commerce. Such are used no less by Continental in carrying on its "local" bread business in Washington. The multi-state character of Continental's coast-to-coast bakery business, including the massive use of interstate mechanisms, brings Continental's bread sales in Washington directly within the authority of *South-Eastern Underwriters*. The Commission did not "misread" this case as establishing that it has jurisdiction over "all acts" of every corporation in interstate

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[29] In *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946), preliminary advertising was held by the Seventh Circuit to be inseparable from the "final" sale and subject to jurisdiction under § 5. In *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), cert. denied, 314 U.S. 668 (1941), the Sixth Circuit refused to consider practices in connection with car sales by local dealers apart from Ford's *total* business. The Court noted that if "separately considered" the sales by Ford's dealers were "intrastate," but when weighed with the interstate business of Ford there was a "close and substantial" relation to interstate commerce. See also *General Motors Corp.* v. *Federal Trade Commission*, 114 F.2d 33 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941).

commerce (Cont. brief, 15). The Commission made no such determination. On the contrary the Commission took great pains to emphasize that its finding of interstate commerce was grounded on the interstate commerce aspects of Continental's integrated, multi-state baking business, exactly as in *South-Eastern Underwriters* (R. II, 836):

> We find that all of Continental's sales in the State of Washington were "in" interstate commerce. All of them involved a New York seller and a Washington buyer. Each of them was an indivisible part of a host of "transactions * * * [that] constituted a single continuous chain of events, many of which were multi-state in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines.

Continental and Langendorf mistakenly assert that *South-Eastern Underwriters* merely determined that insurance was a "commercial activity" subject to the Sherman Act. That *South-Eastern Underwriters* in fact stands for the principle, for which it was cited by the Commission, that "local" transactions are "in" interstate commerce where they are an indivisible part of an integrated, multi-state business is shown by a pronouncement of the Court itself. In *United States* v. *Shubert*, 348 U.S. 222, 226 (1954), the Court said:

> A similarly liberal construction has been given the requirement of §§ 1 and 2 that the "trade or commerce" be "among the several states." Thus, in the *South-Eastern Underwriters* case, the requirement was satisfied by a "continuous and indivisible stream of intercourse among the states" involving the transmission of large sums of money and communications by mail, telephone and telegraph.

There is no significant difference between the interstate transactions utilized to sell insurance, and the interstate transactions utilized in Continental's national bread busi-

ness, including its bread sales in Washington. Continental's bread sales are an indivisible part of a "chain of events" extending from New York headquarters down through the Continental organization to the "local" driver-salesmen in Seattle. Continental's driver-salesmen do not deliver daily thousands of loaves of "Wonder Bread" in Seattle without the benefit of innumerable interstate transactions by the Continental organization. Conversely, as the Seventh Circuit said in *Holland Furnace Company* v. *Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 928 (1960), in rejecting a claim, similar to that in this case, that predatory practices in connection with the "local" assembly and sale of furnaces were not in interstate commerce:

> Without the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations and measured by them Holland has a continuous interstate business reaching into forty-four states. [269 F.2d at 210.]

The multi-state business of Continental, obviously, would cease without the sales of its many local bread and bakery plants. Conversely, Continental's local plant sales would cease without myriad corporate activities directed from New York. With both Continental has, like Holland, a "continuous interstate business" reaching into thirty-two, or more, states.

Nothing in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941), conflicts with the Commission's finding of jurisdiction in this case. *Bunte* was tried and decided entirely on the theory that § 5 gave the Commission jurisdiction over "break and take" candy sales in the State of Illinois which "affected" interstate commerce. The question whether a "Sherman Act" type of trade restraint with respect to "local" sales of an integrated, multi-state business was "in" interstate commerce subject to § 5 was not determined. *Bunte* is not in point in this proceeding.

Continental quotes language from the decision of this Court in *Hills Brothers* v. *Federal Trade Commission*, 9 F.2d 481 (9th Cir. 1926), *cert. denied*, 270 U.S. 662 (1926), that the Commission had no jurisdiction over commerce "wholly" within California. By citing this language, however, Continental begs the question. Continental is obviously not engaged in commerce "wholly" in Washington. In *Hills Bros.*, of course, this Court sustained the Commission order against vertical price fixing applicable to respondent's business in California and elsewhere, noting that the Commission had jurisdiction over commerce "interstate in its character," as is the case here.

Nor do "secondary line" price discrimination cases decided under the Robinson-Patman Act establish petitioners' contention that the Commission here lacks jurisdiction. Continental and Langendorf cite *The Borden Company* v. *Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), and *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). Continental also cites *Myers* v. *Shell Oil Co.*, 96 F. Supp. 671 (S.D. Cal. 1951), and *Lewis* v. *Shell Oil Co.*, 50 F. Supp. 547 (N.D. Ill. 1943). Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), however, forbids:

> . . . . . any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce.

The Federal Trade Commission Act, on the other hand, is less rigorous. It broadly proscribes in § 5 "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Section 2(a) accordingly has been construed as having three specific jurisdictional requisites, (1) that the company be engaged in

commerce, (2) that discrimination be in the course of interstate commerce, and (3) something more, viz., that either the favorable or the prejudicial purchase itself involve movement of goods across state lines, or deal with goods which have or will move interstate, or otherwise have significant interstate incidents.[30] *The Borden Company* v. *Federal Trade Commission, supra.* Thus under § 2(a) jurisdiction in secondary line price discrimination cases has been held not to extend to discriminations with respect to "local" purchases of products produced entirely within a state, even though defendant otherwise made interstate sales. Such facts, of course, would be wholly sufficient to confer jurisdiction over all phases, both intrastate and interstate, of a restraint of trade violative of § 5 of the Federal Trade Commission Act. *Standard Container Mfg. Assn. Inc.* v. *Federal Trade Commission,* 119 F.2d 262 (5th Cir. 1941). Likewise under § 5, as under the Sherman Act, jurisdiction would extend to "local" sales by a national concern of locally produced products because they are part of an indivisible stream of intercourse among the states, as in *South-Eastern Underwriters.*[31] The difference in the jurisdictional treatment plainly derives from the differences in the statutory language.

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[30] A broader interpretation, however, has been placed upon the commerce requirements under § 2(a) in "primary" line price discrimination cases. *Moore* v. *Mead's Fine Bread,* 348 U.S. 115 (1954). There, as described, the statutory jurisdictional requirements were held satisfied by the showing that the beneficiary of predatory price discriminations not moving across state lines was an "interstate combine." See *Foremost Dairies, Inc.* v. *Federal Trade Commission,* CCH 1965 Trade Cases § 71,500, n. 5. (5th Cir. 1965).

[31] In *S. Klein,* 57 F.T.C. 1544 (1960), the Commission stated with respect to § 5:

> It is well established that commerce among the states is not confined to transportation, but comprehends all commercial intercourse between different states and all component parts of such intercourse. Interstate communications for commercial purposes constitute commerce within the meaning of the Constitution. See *Associated Press* v. *N.L.R.B.,* 301 U.S. 103, 128 (1937).

Even under the Robinson-Patman Act, however, the courts have not been consistent in interpreting the jurisdictional requirements of 2(a). In *Shreveport Macaroni Mfg. Co. Inc.* v. *Federal Trade Commission*, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), discriminatory advertising allowances were made only in connection with goods sold intrastate, entirely within Louisiana.[32] Shreveport Macaroni contended that jurisdiction was lacking. The Fifth Circuit declined to adopt this narrow view, stating:

> The discrimination here was in the course of interstate commerce. It ran from one engaged in interstate commerce to others engaged in interstate commerce. It favored interstate chain operators in their whole business including their intrastate competition with grocerymen in Louisiana in the sale of petitioner's products who were not offered allowances on proportionally equal terms. The allowances were effected through the utilization of interstate mechanisms. The power to regulate interstate commerce includes limiting "its employment to the injury of business within the state." [321 F.2d at 408-409.]

The Court thus found an "ample nexus to interstate commerce." The price fixing conspiracy in the instant case, of course, "ran" between companies engaged in multistate operations. Petitioners, furthermore, utilized interstate mechanisms in marketing bread within Washington. Nor can it be questioned that price fixing on bread was an injury to business within Washington.

Langendorf cites the decisions of this Court in *Page* v. *Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961), and *Las Vegas Merchant Plumbers Ass'n.* v. *United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954). Petitioners, however, should derive no comfort for their jurisdictional contention from these decisions. Both cases involved alleged

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[32] Contrary to Continental's assertion (brief, 20) all the goods on which Shreveport Macaroni paid discriminatory allowances were shipped to purchasers in Louisiana.

antitrust violations by *local* firms engaged only in *local* business operations. *Page* concerned legal advertising in purely local newspapers in Los Angeles which specialized in printing legal notices. Obviously, none of the parties were engaged, as petitioners are, in large scale integrated operations transcending many state boundaries. *Las Vegas Merchant Plumbers Ass'n.* similarly concerned a price fixing conspiracy of local plumbing contractors. Again none of the companies involved conducted widespread interstate businesses, and jurisdiction was based on an effect on the flow of plumbing supplies from out-of-state.[33]

Nor does *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), add anything to petitioners' argument. Again, neither interstate movement, the substantial utilization of the channels of interstate commerce, nor an indivisible stream of intercourse among the states was involved. *American News Co.*, 58 F.T.C. 10 (1961), likewise gives no support to petitioners (Lang. brief, 13-14). American News claimed that its purchases from wholesalers who broke up packages of magazines, repacked and resold them, were "intrastate" transactions not subject to the Commission's jurisdiction. The Commission rejected this argument on the merits, but also noted that jurisdiction over the challenged practices, wherever employed, existed in any event on the basis of activities in the District of Columbia. See *Standard Container Mfg. Ass'n.* v. *Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941). On review, however, the Second Circuit summarily dismissed the claimed reason for lack of jurisdiction holding that "the use of the bargaining

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[33] Langendorf's quotations (brief, 17-18) from *Page* and *Las Vegas* refer to the requirement of substantiality where jurisdiction is predicated on an *effect* on interstate commerce under the Sherman Act. Where jurisdiction is based on actual sales across state lines as, for example, petitioners' Alaskan shipments, the amount of such shipments is immaterial. *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 225; *United States* v. *McKesson & Robbins, supra,* 351 U.S. at 310, and other cases cited earlier in this brief.

power of an interstate chain of newstands to secure promotional rebates from giant interstate publishing firms" was within the jurisdiction of § 5. *American News Co.* v. *Federal Trade Commission*, 300 F.2d 104, 108 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962).

Continental refers to past litigation involving large companies (brief, 19), and argues that such cases were wrongly decided or could have been disposed of summarily if the Commission's "simplified" view is good law. The short answer to this contention is that it is possible to predicate jurisdiction on more than one basis. The conceptions relating to interstate commerce, furthermore, are not immutable, fixed for all time. *United States* v. *Swift & Company*, 196 U.S. 375 (1905); *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 35 (1922).

If "local" price fixing by Continental is exempted from the antitrust laws the pattern for price fixing is simple in the baking industry, and in other industries where the nature of the product requires local manufacture and distribution. Bakery products including bread are highly perishable. Bread, to be considered acceptably fresh by the consuming public, must be sold within approximately 48 hours after baking. Bread and bakery products are also bulky in relation to their weight, thus making long distance transportation economically impractical. Hence, Continental establishes local plants near consuming centers in each of 32 states, and sells in nearby markets. Continental's Seattle plant, therefore, markets its output, except for sales to Alaskan purchasers, within Washington. The same is true for the Seattle plant of Safeway, excepting shipments to its Portland operation, and for Langendorf's Seattle plant, also except for shipments to Alaska. Hence, fortuitously, because of the nature of the baking business, and the consequent existence of local plants, Continental, Langendorf and Safeway, under their interpretation of the law, are in position to fix prices in Washington, and escape, if challenged, on the ground they are beyond the jurisdiction of the Federal Trade Commission Act. The operation of the antitrust laws, social and

economic legislation of major importance to the nation, cannot depend upon such adventitious circumstances.

3. An unlawful conspiracy between petitioners, Bakers of Washington, Inc., and others, fixing the price of bread in the State of Washington, is an unfair method of competition in interstate commerce regardless of whether or not petitioners' bread sales in the State of Washington are considered to be in interstate commerce.

Counsel for Continental conceded at oral argument before the Commission that if the president of Continental in New York, and the president of Langendorf in San Francisco, conversed by telephone and fixed the price of bread in Seattle, the conspiracy would fall within the jurisdiction of the Commission. Counsel for Continental further conceded that if the president of Continental telephoned Continental's plant manager in Seattle and told him to get together with the Seattle manager of Langendorf and agree to stop price cutting on bread in Seattle, the conspiracy would likewise fall within the jurisdiction of the Commission.[34] Yet counsel for Continental takes the position that the Commission would not have jurisdiction if the Seattle manager of Continental and the Seattle manager of Langendorf get together in Seattle on their own initiative to accomplish the same result, even though it is clear that

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[34] Counsel for Continental stated at oral argument before the Commission:

> MR. SCHAFER: Mr. Chairman, if the president of Continental sits up in New York and calls up the president of Langendorf in San Francisco and says, "Come on, let's get our prices up in Seattle," there is no question in our minds that you would have jurisdiction.
>
> CHAIRMAN DIXON: But if the president of Continental called up the manager of his plant in Seattle, and the president of Langendorf called up his manager in Seattle and said, "You two knotheads get together now," what would happen?
>
> MR. SCHAFER: I quite agree that again you would have an act or practice of [sic] crossing a state line. [R. III-C, 21-22 near end of volume.]

both petitioners assume legal responsibility for acts of their plant managers in Seattle (R. I, 299, 304).

The erroneous aspect of this conception lies in the notion that Continental as a corporation can be fragmented. The fact is, however, that the alleged conspiracy involved Continental, Langendorf, and Safeway. It was not between segments or parts of those entities, or their Seattle plants. It makes no difference at what level Continental became part of the challenged agreement. The important consideration is that Continental entered it. As Continental admits, the Federal Trade Commission would have jurisdiction over the challenged price fixing agreement had the president of Continental telephoned his Seattle manager directing him to agree with his competitors as to Seattle bread prices. Conceptually it can make no change in this result if the president of Continental journeyed to Seattle and issued instructions on the spot to agree with competitors as to Seattle bread prices, or if Continental's Seattle officials did so in their own discretion.

An agreement involving Continental, Langendorf, and Safeway, who are engaged in the production and sale of bread on a national or regional basis, and Bakers of Washington, Inc., and other local concerns, to tamper with bread prices in the State of Washington comes fully within the scope of *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). In the *Cement Institute* case, the unlawful conspiracy violative of § 5 of the Federal Trade Commission Act related to local pricing of cement by two Washington portland cement producers, Superior Portland Cement Company and Northwestern Portland Cement Company. Superior and Northwestern were both incorporated in the State of Washington and operated cement plants in the Puget Sound area. Except for some shipments to Alaska by Superior, cement produced by these companies was sold only within the State of Washington. Both Northwestern and Superior under these circumstances, relying on *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349 (1941), urged that the

Commission lacked jurisdiction over their alleged unfair practices concerning cement produced and sold only within the State of Washington. The Supreme Court rejected this argument, commenting:

> The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. [333 U.S. at 696.]

Similarly in *Salt Producers Ass'n.* v. *Federal Trade Commission*, 134 F.2d 354 (7th Cir. 1943), the petitioner salt producers and their association, like the Washington producers in *Cement Institute*, insisted that the Commission had no authority to control an unlawful agreement relating to the "intrastate" activity of the production of salt. The Court of Appeals dismissed this contention, commenting:

> The production of salt is a local transaction, but an *agreement* between many producers, of diverse citizenship, to limit their respective productions is an unfair method of competition *in* interstate commerce. [134 F.2d at 359.] [35]

Likewise, price fixing involving Continental, Langendorf and Safeway, all of whom operate on a multi-state basis from out-of-state headquarters, is "in" interstate commerce whether such agreement relates to or affects prices within one state, or within several.

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[35] In *California Rice Industry* v. *Federal Trade Commission*, 102 F.2d 716 (9th Cir. 1939), the fixing of milling quotas among California rice producers was held to be intrastate on the authority of *Carter* v. *Carter Coal Co.*, 102 F.2d at 722-723. The *Carter* case, however, was later overruled in *Wickard* v. *Filburn*, 317 U.S. 111, 122 (1942).

III. Petitioners were accorded a fair hearing before the Commission.

1. *The Commission could properly take official notice of facts about Continental established in a simultaneous proceeding before the Commission.*

The Commission took official notice (R. II, 829-836) of certain facts about Continental's "overall operation" of its multi-state baking business which had been testified to by Continental's own officials, or were derived from Continenal's own business records, in another case before the Commission in which Continental was the respondent.[36] *In the Matter of Continental Baking Company*, Dkt. 7630. The purpose of the Commission in officially noticing such facts was to demonstrate in specific detail the manner in which Continental conducted its integrated national baking business, and to show the basis for its finding that Continental's Washington bread sales were "in" interstate commerce.

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[36] Contrary to Continental's assertion (brief, 47, also 38, 46), and that of Safeway (brief, 44), the Commission found no "fatal gaps" in the record in this case making it legally insufficient to sustain a finding of interstate commerce based on Continental's integrated multi-state baking operation of which Washington sales were an indivisible part. On the contrary, the Commission affirmatively found that the record showed "the broad contours of the taut strings that tie the Seattle plant manager to his out-of-state employer in New York" (R. II, 829).

Continental stipulated (R. I, 304-305), among other things, that its coast-to-coast baking business was conducted on an integrated basis, that purchasing was done at headquarters in New York, that all receipts went into a single treasury, that ultimate responsibility for company affairs was centralized in New York, that *each element of its bread and bakery business was part of an integrated whole,* that Continental was a single entity, that Continental benefited by what was done by its individual bakeries and its local officials, such as those in Washington, that New York headquarters of Continental approved membership in Bakers of Washington, Inc. Local Continental officials, of course, only exercise authority delegated to them from New York. See also stipulation of petitioners Langendorf (R. I, 298-300) and Safeway (R. I, 301-303). Official notice added details to such basic evidence in itself sufficient to sustain jurisdiction.

Continental, and all other petitioners, none of whom had offered any evidence whatsoever prior to the Commission's opinion, were, in accordance with § 7(d) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. § 1006(d), given a full opportunity to rebut the facts officially noticed. Nevertheless, Continental claims the taking of official notice was error, and that the noticed facts were "disputed." [37] Langendorf, Hansen and Safeway argue that they were denied a "full and fair" hearing because they were not "parties" in Dkt. 7630. The latter contention, of course, ignores the full opportunity to rebut the noticed facts offered by the Commission, and which neither Langendorf, Hansen nor Safeway chose to accept.

Official notice and judicial notice are not the same thing. Prof. Davis in an article "Official Notice" in 62 Harv. L. Rev. 537 (1949), states:

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[37] The Commission stated (R. II, 830, n. 10) that the facts noticed from Dkt. 7630 were "undisputed" by Continental in that proceeding. Continental concedes this (brief, 39). By claiming that the Commission noticed "disputed" facts Continental evidently refers to the testimony of its officials on remand that the sale of bread in Washington was a "local sales effort," which Continental regards as controverting the broad thrust of the noticed facts. In the vast majority of particulars, however, Continental did not controvert the facts noticed by the Commission. This aspect is discussed later. See R. II, 986-999. Indeed, Continental concedes that it did not try to "negative" each fact noticed by the Commission (brief, 23), but tried to show that the sale of bread was a "local business."

Of course, even if the sale of bread in Washington were a "local business" dependent on "local sales effort," this would not alter in the slightest the fact that, like insurance sales, Continental's Washington bread sales were *also* an indivisible part of a host of transactions crossing state lines in the conduct of a national, integrated baking business.

Continental erroneously states that the noticed facts from Dkt. 7630 were "never in issue" in that proceeding (brief, 39). This is not correct. The hearing examiner in that case specifically found Continental's "local" sales in New Jersey to be "in" interstate commerce because they were part of a chain of Continental transactions crossing state lines. See Initial Decision, Dkt. 7630, p. 42, and pp. 34-42. Dkt. 7630 involved the same jurisdictional dispute as exists in this case.

> The customary assumption that official notice is merely the administrative counterpart of judicial notice and should therefore be governed by essentially the same principles is fundamentally unsound and causes much harm.

Official notice derives from § 7(d) of the Administrative Procedure Act, as follows:

> (d) RECORD.— . . . Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Official notice is broader than judicial notice. The committee on administrative procedure appointed by the Attorney General stated that under § 7(d) official notice should not be limited to the traditional matters of judicial notice. *Administrative Procedure In Government Agencies*, Senate Doc. No. 8, 77th Cong., 1st Sess., pp. 71-73 (1941). In 1947 the *Attorney General's Manual on the Administrative Procedure Act* reiterated the principle that the scope of § 7(d) was broader than judicial notice (p. 80).

The Commission in this case observed the provisions of § 7(d) *to the letter*. First, the Commission spread on the record every fact about Continental it was officially noticing (R. II, 829-836). Second, Continental, and all other parties were offered an opportunity to "show the contrary" of every fact noticed[38] (R. II, 829-831, n. 10). The record in this case was reopened (R. II, 877) on Continental's motion specifically to allow Continental an opportunity to "show the contrary." Any petitioner could have had such an opportunity, but no party except Continental sought one. Third, the Commission analysed the contentions of Continental, and gave particular emphasis to the

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[38] An opportunity to "show the contrary" of officially noticed facts is specifically provided for in the Commission's Rules of Practice For Adjudicative Proceedings. 16 C.F.R. (Supp. 1965), § 3.14 (d).

question whether or not, or in what respects, Continental might have shown the contrary of the noticed facts.

Continental was, of course, a party in Dkt. 7630. The facts noticed about Continental were of the kind the Commission could have noticed, at least as to Continental, even without granting an opportunity to "show the contrary." In *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y. 1944), *aff'd* 323 U.S. 684 (1944), the Interstate Commerce Commission had made a finding in one proceeding that a motor carrier was "able properly to perform the service proposed." There was no evidence supporting this in the record. The Commission, without giving an opportunity to rebut, relied on another proceeding, recently conducted for it, for facts to support the finding. In rejecting a claim of error, the District Court wrote:

> Plaintiffs here were parties to the consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp.* v. *West Virginia Pulp & Paper Co.*, 2 Cir., 141 F.2d 1, *Goldstein* v. *Groesbeck*, 2 Cir., 142 F.2d 422, citing *National Fire Ins. Co. of Hartford* v. *Thompson*, 281 U.S. 331, 50 S. Ct. 288, 74 L.Ed. 881 which collects the Supreme Court cases; and the Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission* v. *Louisville & N.R. Co.* 227 U.S. 88, 93, 33 S. Ct. 185, 57 L.Ed. 431. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case. [56 F. Supp. at 880.]

See also *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 528-530 (1945); *Paramount Cap Mfg. Co.* v. *Nat'l Labor Relations Board*, 260 F.2d 109, 113 (8th Cir. 1958); *Pittsburgh Plate Glass Co.* v. *Nat'l Labor Relations Board*, 313 U.S. 146, 157-158 (1940); *Yee Chun* v. *Nagle*, 35 F.2d 839, 840 (9th Cir. 1929).

It is, moreover, well settled that a regulatory agency in making its decisions has the right to take official notice of reports filed with it by a regulated company. *P. Saldutti & Son* v. *United States*, 210 F. Supp. 307, 313 (D. N.J. 1962); *Dance Freight Lines, Inc.* v. *United States*, 149 F. Supp. 367, 372 (E.D. Ky. 1957); *State of Wisconsin* v. *Federal Power Commission*, 201 F.2d 183, 186-187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934. The testimony of Continental's officials, and Continental's own records, are obviously in a similar category.

Indeed, the facts noticed about Continental from Docket 7630 could properly have been noticed by the Commission under the traditional principles of "judicial notice." A tribunal in its discretion on considerations of expediency and justice, may take notice of its own records in other proceedings. *National Fire Insurance Co.* v. *Thompson*, 281 U.S. 331, 336 (1930); *Bienville Water Supply Co.* v. *Mobile*, 186 U.S. 212, 217 (1901); *United States* v. *Pink*, 315 U.S. 203, 216 (1942); *Kithcart* v. *Metropolitan Life Ins. Co.*, 88 F.2d 407, 411 (8th Cir. 1937); *Lowe* v. *McDonald*, 221 F.2d 228, 230 (9th Cir. 1955); *Paramount Cap Mfg. Co.* v. *Nat'l Labor Relations Board*, *supra*, 260 F.2d at 113.

Continental's reliance in objecting to official notice upon quotations from Prof. Davis (brief, 42-43) distinguishing between "adjudicative" and "legislative" facts is misplaced. The facts about Continental in the record in Dkt. 7630 were not in the category of "adjudicative" facts Prof. Davis thought should be introduced directly through witnesses or documents. Continental (brief, 43) conveniently does not continue Prof. Davis' quotation. Prof. Davis went on to explain the sort of "adjudicative" fact he had in mind:

> For instance, on the disputed question whether the tavern licensee sold beer to a minor, the agency should clearly not be allowed to interview witnesses outside the hearing room. [2 Davis at 403.]

There is no question, of course, in this proceeding of the Commission utilizing official notice for any such *ex*

parte procedures. Prof. Davis, in fact, approves of official notice of "adjudicative" facts in many situations. The key consideration is the chance to "meet" the noticed facts. If an opportunity to rebut the facts noticed is granted, official notice is proper. 2 Davis 403. Thus, concerning the above tavern licensee he states:

> On the question of the practice of competitors of the licensee, relevant to the issue of whether the license should be revoked or whether it should be suspended for a short period, the reasons for record evidence are much weaker, so that putting the facts into a proposed report would be reasonable thereby permitting the licensee to challenge through written or oral argument and to apply for a reopening of the hearing if he can demonstrate the need for rebuttal evidence or cross examination. [2 Davis 403.]

In *McDaniel* v. *Celebrezze*, 217 F. Supp. 952 (D. Md. 1963), official notice was taken of matter in a number of published medical texts, and of governmental studies of employment opportunities. The Court rejected a claim of error because an opportunity to rebut had been granted. Cf. *Glendenning* v. *Ribicoff*, 213 F. Supp. 301 (W.D. Mo. 1962), where no opportunity to rebut was given. Likewise, in *American Trucking Associations, Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), notice of internal agency practices was taken in a report to the Interstate Commerce Commission made after adjudicatory hearings had been concluded. At issue was the omission of operating restrictions in a certificate granted. The report took official notice for the first time of the agency's internal practices, and found the omission was the result of administrative mistake. The appellee motor carrier objected to notice of facts after hearings had been closed. The Court found no error because of the existence of an opportunity to rebut, saying:

> But we fail to see what prejudice could have accrued from taking official notice of the practices, for appellee had adequate opportunity to rebut inferences

> drawn from them on its argument to the Commission. [358 U.S. at 144.]

In *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528 (1945), decided before official notice was specifically sanctioned by § 7(d), two different motor carriers made application to expand their routes. Competing carriers opposed both applications which were heard in separate proceedings by different boards. The Interstate Commerce Commission, however, did not consider each case exclusively on its own record, but utilized in each facts contained in the other. No opportunity to rebut was granted. On appeal the Court made clear that a chance to "meet" facts utilized from another record would obviate any question of prejudicial error. 327 U.S. at 528. In fact, the Court in *Pierce* even went farther and observed:

> . . . the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. [327 U.S. at 530.]

Thus, even where no opportunity to show the contrary has been granted, official notice of facts outside the record would be wholly proper "in the absence of any showing of specific prejudice." 327 U.S. at 529. Obviously no specific prejudice can be present where Langendorf, Hansen and Safeway, as well as Continental, were told in meticulous detail the facts noticed about Continental from Dkt. 7630, and given an unfettered opportunity to "meet" them.[39] Langendorf, Hansen and Safeway all quote from *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924), that "nothing can be treated as evidence

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[39] Langendorf, Hansen and Safeway all persist in arguing as if they had been denied any chance to meet the facts noticed. As is now obvious the opposite is true. Safeway, at another point, incorrectly suggests that the Commission limited the opportunity to show the contrary to "affidavits" (brief, 41). The truth is this proceeding was completely reopened (R. II, 877) permitting the fullest opportunity to "meet" the noticed facts by testimonial and documentary evidence, including the submission of briefs.

which is not introduced as such." They then apply this excerpt literally, to condemn the use of official notice in this case. Such a result, of course, cannot be correct for it would destroy the specific authorization of official notice contained in § 7(d). Prof. Davis noted that the same language quoted by petitioners from *Abilene* was "loose" and a literal interpretation was probably not intended. 2 Davis 403, n. 8. The Attorney General's Manual, moreover, at p. 80, states that the facts noticed under § 7(d) furnish the same basis for findings as evidence in the usual sense.

Continental's contention that official notice here was error because it shifted the burden of proof is also untenable (brief, 41, 46). Again, if this argument were correct no official notice whatsoever would be permissible—an obviously untenable position. Official notice continues to be a vital procedure. *Brite Mfg. Co.* v. *Federal Trade Commission*, 347 F.2d 477 (D.C. Cir., 1965).

Petitioners also quote from *Western Sugar Refining Co.* v. *Federal Trade Commission*, 275 F. 725 (9th Cir. 1921). But there is no question in this case of holding petitioners without evidence. In *Kline* v. *United States*, 41 F. Supp. 577 (D. Neb. 1941), cited by Safeway, no chance to rebut had been given. This is the very opposite of the situation in this proceeding. In *E. B. Muller* v. *Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944), also cited by Safeway, the Commission did not disclose until its final decision the particular sales found to be discriminatory out of hundreds documented. Although the proceeding was not reopened, no prejudicial error was found despite the fact that the Court thought a prior disclosure should have been made. 142 F.2d at 519. The Sixth Circuit noted that under § 5(c) of the Federal Trade Commission Act petitioners could apply for a reopening, and that no denial of due process occurred if there was a failure to do so. If the failure to apply for a reopening obviates any question of denial of due process, *a fortiori* no error can exist where the case has ac-

tually been reopened, and an opportunity to "show the contrary" has been granted to all parties.

2. The Commission properly found that in most particulars Continental failed to show the contrary of facts officially noticed.

The facts about Continental noticed by the Commission in this proceeding are set out at R. II, 829-836. Continental on reopening called as witnesses eight of its officials. In an opinion issued December 3, 1964 (R. II, 986-999), the Commission concluded that the testimony of these Continental officials "affirms the essentials of the Commission's noticed findings as to Continental's organizational structure and general operational methods." In some particulars, however, the Commission found Continental had controverted noticed facts, and in a few instances the Commission did not accept Continental's claims. Contrary to suggestions in Continental's brief, however, the bulk of the noticed facts were not controverted.

No evidence from Continental's eight company witnesses contradicted the facts noticed under "A. Corporate Organization," "C. Purchasing," "F. Money collected from sales," "G. Accounting," "I. Insurance," "J. Engineering," or "K. Vehicles." Under "B. Territorial Assignments," Continental only challenged one statement of the Commission. Counsel for Continental read to its San Francisco regional manager the statement that the regional office "controls the territory to be served by each of the local baking plants," asking if the statement were true or false. The regional manager declared it false (R. III-C, 721). According to the regional manager the territory served by the Seattle plant is left to the "terrain" (R. III-C, 720). However, there is not, nor could there be, any contention that headquarters and the regional manager do not have authority to order the Seattle manager either to sell or not to sell in any given area. Superior authority in Continental, of course, has this power

and can exercise it whenever Continental's interests dictate. Testimony as to geographical factors and to local discretion does not controvert the existence of ultimate "control" in headquarters and the regional office.

Under "D. Production," none of Continental's eight company witnesses denied that Continental makes efforts to maintain rigid control of quality, and issues "Production Bulletins" prescribing production standards in exact detail. Nor did these Continental witnesses maintain that the San Francisco production supervisor was not "constantly in touch with the plants." The testimony of Continental's Seattle manager in effect was that headquarters held him responsible for the quality of "Wonder Bread" baked at the Seattle bakery, but that he could deviate from "Production Bulletins" where necessary to maintain quality. This testimony does not controvert the facts officially noticed under "D. Production." Plainly the existence of local responsibility does not contradict the insistence by headquarters and the regional office on a rigid standard of quality, nor the exercise of supervision over local plants as necessary to secure such quality.

Under "E. Pricing" Continental elicited testimony from the regional manager that he left complete control to the Seattle manager (R. III-C, 723). This testimony on remand is diametrically opposed to documentary evidence previously received in this proceeding and the Commission found it "wholly unpersuasive" (R. II, 991).[40] For example, in the case of the 1958 increase in the price of bread by Continental, the Seattle manager first wrote to the Continental regional manager in San Francisco *seeking approval* of a price increase. The Seattle manager wrote "*We would appreciate your approval of this change*" (R. IV, 1057). The San Francisco regional manager then

[40] Contrary to Continental's assertion (brief, 48) the Commission is not compelled to accept every statement of Continental's officials on remand, and abandon every fact when contradicted. Nothing in § 7(d) requires this, and the *Attorney General's Manual on the Administrative Procedure Act* (1947) at p. 80 clearly contemplates an evaluation by the agency of the "proof" offered where an attempt is made to show the contrary.

wrote New York headquarters, with a personal copy to the Continental president, *asking approval* (R. IV, 1055). At headquarters in New York, the president of Continental replied to the San Francisco regional manager, "This is our approval of the price increases" (R. IV, 1059).

In 1957 the Seattle manager wrote to the San Francisco regional manager:

> To meet competition *would appreciate your approval* to increase price of small white from .21¢ to .22¢ and large units from .30¢ to .31¢. [R. IV, 1063, emphasis added.]

The San Francisco regional manager then wrote to the Continental president in New York headquarters asking approval (R. IV, 1061). The Continental "Director of Costs and Statistics" at headquarters sent a personal note to the president suggesting that "approval" of the 1958 price increase "should be issued from your office" (R. IV, 1050). In 1956 similar intracompany correspondence took place. The Seattle manager sought approval for the increase from the San Francisco regional manager (R. IV, 1071) who again passed the request to the Continental president in New York (R. IV, 1067). The latter responded with approval (R. IV, 1065).

Furthermore, during hearings in this case prior to reopening, the Seattle manager of Continental did not indicate in any way that price increases were unilateral decisions made by him. On the contrary, he referred to proposed increases as "suggestions" to higher authority, and spoke of receiving "approval" from above. See R. III-B, 411, and 426-427. Indeed, Continental's own counsel, in connection with the price authority of the Seattle manager, stated on the record during the original hearings in this case:

> * * * I think that what he [Seattle manager] meant to testify to, your Honor, was that he writes a letter of recommendation to his regional manager and subsequently gets approval for a price change but that he did not mean to testify to, your Honor, that he

> was able to say what goes on internally in Rye, New York. [R. III-B, 425.]

Thus the Commission was fully justified in rejecting the contention of Continental on remand that the Seattle manager had sole discretion over the price of "Wonder Bread," and in finding that Continental had not shown the contrary.[41] The Court's statement in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) is appropriate:

> * * * most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight * * *.

The Commission found that Continental had shown the contrary of some facts noticed under "H. Personnel." The Commission concluded after reopening that "the Seattle plant manager does not need regional or home office approval to hire and fire 'department heads'." This does not mean, however, that Continental's personnel policies are a local matter. The Seattle manager was transferred there in February 1962, after more than four years with Continental in San Francisco (R. III C, 708-709). The sales manager in Seattle, at the time of remand, had held that position less than a year, having been transferred from production manager in San Francisco (R. III-C, 733).

As to facts noticed under "L. Sales," the regional manager claimed that each Continental plant manager under his supervision was responsible "for his own sales volume as well as his profits" (R. III-C, 725-726). But this does

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[41] No collateral estoppel was raised against Continental as to facts the Commission found were not rebutted (brief, 39-40). Collateral estoppel prevents relitigation between the parties of facts actually litigated and determined in a prior proceeding. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948). Obviously the Commission did not "estop" Continental from attempting to show the contrary of noticed facts, but rather evaluated the "showing" made.

not "show the contrary" of the Commission's finding that the regional manager is held responsible by headquarters in New York for the "sales volume of the region as a whole" (R. II, 992, n. 7). The Continental regional manager's denial, however, if his testimony on reopening is so construed, of any responsibility for Seattle plant sales, as to which he is in a supervisory capacity, is contradictory to testimony of Continental in Dkt. 7630 (R. II, 834-835) as well as to obvious inferences from evidence in this proceeding. Denial of any responsibility for Seattle sales is inconsistent with the fact that the San Francisco regional manager has on his staff a "Regional Sales Manager," a "Regional Production Supervisor," a "Regional Cost Analyst," a "Regional Vehicular Supervisor," a "Regional Engineer," and a "Regional Personnel Director" (R. III-C, 718-719). If the Seattle plant, and the other local plants within the San Francisco region, "run themselves" the foregoing officials are functionless, superfluous, and erroneously titled, and the term *supervisor* in each title is meaningless. As a former regional sales supervisor, the Seattle manager agreed that he "spent a great deal of time here in Seattle" (R. III-C, 709). He had no hesitancy in acknowledging that the Continental regional manager in San Francisco was his "immediate supervisor," *e.g.*, "*Mr. Hooks is my immediate supervisor. He is the regional manager*" (R. III-C, 710).

Under "M. Labor Relations," the Commission accepted the contention that the "labor relations man" at headquarters in New York does not participate in the negotiations of the Seattle plant's labor contracts. Contrary to the intimation in Continental's brief (p. 35), neither the Seattle manager nor the San Francisco regional manager denied that New York headquarters designs most of the wrappers and packages used by Continental. Essentially they only claimed on remand local discretion in using particular packages, but "it is all carefully checked through the legal department" at Continental headquarters (R. III-C, 683).

Nothing on remand was inconsistent with the few facts noticed under "N. Packaging." No testimony was elicited, of course, that the Seattle manager could refuse to use or revise the nationally known "Wonder Bread" wrapper shown on Continental's 1960 Annual Report (R. IV, 1076). And none of Continental's witnesses on remand denied the essentials of the facts noticed under "O. Advertizing." None denied that all major advertizing is handled from New York headquarters. They merely claimed some discretion in deciding how the Seattle plant's local advertising budget was to be spent (R. III-C, 695, 713-714), as distinguished from Continental's "mass media" advertising handled from New York, and authority to place local advertising (R. III-C, 786-787). But Continental did not contradict the noticed fact that virtually all of Continental's advertising is *placed* and *paid for* by headquarters in New York. Headquarters, of course, has "control," and can veto any advertising project proposed by the local Continental officials.

A general comment on Continental's contentions on remand is appropriate. By emphasizing, if not magnifying, the authority of local employees, Continental attempted to divorce its Seattle operation from its $476,043,000 integrated national baking business. But neither the need for local sales effort to market bread nor the delegation by New York headquarters of authority to local employees can alter the fact that Continental's Washington sales are an inseparable part of Continental's multi-state business, and involve myriad transactions between headquarters, local plants and regional offices crossing state lines.

3. *Chairman Dixon was not disqualified from participation in this proceeding.*

On October 21, 1964, nine months after the Commission had issued its decision and opinion, Continental claimed for the first time that Chairman Dixon was disqualified from participation in this case (R. II, 902). The "basis" for this late claim of disqualification was Chairman

Dixon's participation over five years earlier on June 18, 1959, at a hearing before the Senate Subcommittee on Antitrust and Monopoly at which the president of Continental testified.[42] Continental, although it has been litigating this case since April 14, 1961 (R. I, 11), suddenly decided that the "appearance of objectivity, impartiality and fairness would be lost" unless Chairman Dixon were disqualified (R. II, 905). Chairman Dixon refused to disqualify himself, stating that he had made "absolutely no prejudgments of any kind in this case," and harbored "no biases of any sort against Continental." Full consideration was given to Continental's "appearances" argument, but no valid reason for withdrawal was found (R. II, 913-922).

In the first place, Continental's motion to disqualify was not timely. At no time between the issuance of the hearing examiner's decision on July 20, 1962 (R. I-A, 515-550) and the Commission's decision on the merits on February 28, 1964, did Continental raise any question about "appearances" or Chairman Dixon's "objectivity, impartiality and fairness." On the contrary, Continental prosecuted its appeal, filed its briefs, argued orally to the Commission with Chairman Dixon participating (January 9, 1963), and awaited the Commission's decision without any suggestion that events in 1959 disqualified him.

In *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F.2d 589 (7th Cir. 1945), *aff'd.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700 (1948), a year after the taking of testimony had been concluded, Marquette "asserted for the first time that the Commission had prejudged the issues." Five months later, at oral argument, Marquette formally charged that the Commission was disqualified. The Commission, however, refused to disqualify itself citing among its reasons

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[42] "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

that the motion was not made in apt time. The Seventh Circuit sustained the Commission stating:

> * * * we think the Commission could not be disqualified in the manner attempted, but assuming it could be, *we are of the view that the attempt to disqualify was made too late.* [147 F.2d at 592, emphasis added.]

In this proceeding Continental's motion was far more untimely.

Nor is there any merit to Continental's claim that the alleged "basis" arose for the first time on remand. The questions addressed to Continental's president in the 1959 Senate hearings were known to Continental's counsel from the beginning.[43] The excerpts introduced on reopening by Commission counsel changed nothing. There is no magic in an exhibit that can create disqualification if none existed prior to receipt in evidence. If such existed here prior to receipt, it went back to 1959 and Continental's attempt to disqualify "was made too late."

The jurisdictional concept that Continental's Washington bread sales were an indivisible part of Continental's integrated national baking business conducted from New York, involving a host of transactions crossing state lines, did not originate for the first time in the Commission's opinion of February 28, 1964. This concept, contrary to Continental's assertion (brief, 63), has been a part of this proceeding from the beginning. On February 26,

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[43] When Continental's president appeared on June 18, 1959, before the Senate Subcommittee he was accompanied by Roy M. Anderson, then Continental's assistant general counsel (Subcommittee Hearings, Pt. 12, p. 6107). Mr. Anderson, later General Counsel, participated in this proceeding continuously, and appeared "of counsel" on Continental's Petition for Review of the hearing examiner's initial decision filed August 22, 1962 (R. I-A, 559). He also appeared "of counsel" on Continental's exceptions to the initial decision and brief to the Commission. Indeed his name appears on the very first paper filed by Continental in this case on April 14, 1961 (R. I, 12). No mention was ever made of any alleged bias or prejudice on the part of Chairman Dixon, or that "appearances" disqualified him, until October 21, 1964. Chairman Dixon has been a member of the Commission since March 21, 1961.

1962, Commission counsel, in answer to a concerted attack on the Commission's jurisdiction, argued this very point before the hearing examiner (R. III-B, 647-652). He urged that Continental's multi-state baking business must be considered "as a whole," that Continental's integrated, national operation was "commanded" from New York, and that Continental's business could not be split into segments. The *Swift, supra*, 196 U.S. 375, and *South-Eastern Underwriters, supra*, 322 U.S. 533, cases were both cited. The hearing examiner utilized the foregoing concept of commerce (R. I-A, 535-542), refusing to "create an intra-state island" of Continental's business in Washington. Petitioners appealed, and the very same concept of commerce again arose at oral argument before the full Commission including Chairman Dixon (R. III-C, 20-24, at end of volume). There is thus no justification for Continental's failure to raise its claim of disqualification until October 21, 1964 (R. II, 902) when proceedings by the Commission were virtually at an end.

Furthermore, the 1959 Subcommittee hearings show no prejudice of any sort relevant to this proceeding, and "appearances" did not require Chairman Dixon's withdrawal. Continental (brief, 61) quotes a question of Chairman Dixon alleging that it "suggests a pronounced view" of Continental's internal pricing practice. But a mere inquiry by Chairman Dixon in 1959 of the president of Continental, as to whether he wanted to leave the impression that Continental's plant managers had the right to make a major price change without his approval, "suggests" nothing. President Laughlin of Continental incidentally denied such a right, stating that local plant managers could "make the recommendation" (R. II, 893). Certainly this colloquy reveals no "conclusion" on the part of Chairman Dixon as to the merits of this proceeding or the existence of jurisdiction in the Commission.[44] In fact, this case was not

[44] Continental writes (brief, 61-62) as if the entire issue of jurisdiction turned on whether Continental headquarters "approved" price changes initiated by Continental executives in individual mar-

even initiated until March 7, 1961, about two (2) years later (R. I, 8). The second quotation urged in Continental's brief (61-62) as disqualifying is a two sentence excerpt from the bottom of p. 147 of Senate Report 1923, 86th Cong. 2nd Sess., stating that "generally" in multi-plant companies local plant managers initiate price changes which must be submitted to and approved by headquarters. Chairman Dixon is said to have been "surely acquainted" with this report, although he is not charged with having written it. The statement in any event is utterly innocuous. It is at most a mere generality showing no prejudgment in any specific case.

Continental's charge that the participation of Chairman Dixon in the decision of the commerce question violates the "appearance" of fairness is simply an assertion. The issue of jurisdiction in this case, aside from Alaskan sales, is a technical legal question involving the construction to be placed on § 5 of the Federal Trade Commission Act. Such a question was not even remotely involved in the 1959 Senate hearings.

Continental cites *Texaco, Inc.* v. *Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964), and *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962). But those cases are completely different on their facts from anything in this proceeding. *Texaco* involved a speech by Chairman Dixon, when he was Chairman of the Commission, about a case pending before the agency which the court thought revealed "that he had in some measure decided in advance that Texaco had violated the Act". 336 F.2d at 760. *Texaco* thus has no resemblance whatsoever to this case. In 1959, when the Senate hearings were held, complaint had not even issued in this matter and did not issue until 1961.

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kets. Evidence in this case, already reviewed, proves such approval is required, but this is merely one facet of the management of Continental's multi-state baking business from New York headquarters involving many transactions crossing state lines.

A conclusion, even if it existed, that local managers only initiated price changes, and that such changes had to be approved by headquarters, does not show any "preconceived opinion" that the Commission had jurisdiction in this case.

Chairman Dixon, of course, was then not connected with the Commission. Obviously nothing was, nor could have been, said in the 1959 hearings indicating any preconceived opinion that the Commission had jurisdiction under the facts in this record, or on any other issue in this proceeding. In *Amos Treat* a member of the Securities and Exchange Commission was barred from sitting in judgment on a case until the question of his participation in the same case as a staff member was resolved. Plainly such a situation is utterly different so far as "appearances" are concerned from that here involved. Continental seeks to distinguish *Federal Trade Commission* v. *Cement Institute*, *supra*, 333 U.S. at 700-703, by arguing that "legislative" facts were there involved. The Court, however, made no such distinction.

In *Cement Institute* some of the members of the Commission prior to the issuance of the complaint:

> * * * were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. [333 U.S. at 700.]

The legal effect of the use of a multiple basing point system was a key point in issue. The Supreme Court, nevertheless, rejected any suggestion that such an opinion was disqualifying, commenting:

> In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. [333 U.S. at 701.]

Obviously if the formation of an actual opinion as to the illegality of the basing point system did not prevent the Commission from passing on such a system in *Cement Institute*, the mere posing of some questions to the president of Continental two years prior to the commencement of this case could not possibly disqualify Chairman Dixon because of "appearances." In any event not only was no opinion formed in this case, but nothing in the 1959 Senate Subcommittee proceedings would even suggest the appearance of bias or prejudice to an impartial observer.

IV. The Commission properly entered an order prohibiting petitioners from engaging in price fixing activities in any of the areas in which they sold bread.

Petitioners contend that the Commission's order is improperly broad and that it should have been limited to the geographical area in which the proof showed petitioners to have engaged in price fixing, that is, as they contend, the "Seattle marketing area".[45] The Supreme Court has made it clear, however, that the Commission has wide latitude in fashioning an order adequate in its discretion to cope with unlawful practices found to exist. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission* v. *National Lead*, 352 U.S. 419, 428-430 (1957). The Commission concluded that there was no reason to suppose that an entity such as Continental showing no reluctance to fix prices in Seattle, Washington, would act differently in another city or another state (R. II, 864). Congress has placed primary responsibility for fashioning orders upon the Commission, and courts will not interfere where the remedy is an allowable exercise of the Commission's judgment. *Jacob Siegal Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612, 613 (1946); *Niresk Industries, Inc.* v. *Federal Trade*

[45] Contrary to assertions of Continental (brief, 66) and Langendorf (brief, 38), the evidence of price fixing was not limited to the "Seattle marketing area" but extended to the area of the membership of Bakers of Washington, Inc. Such area was essentially western Washington including Yakima.

Commission, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960). Commission orders will not be lightly modified. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The conclusion that Continental, a coast-to-coast business, having engaged in price fixing activities in the State of Washington, should be under an order prohibiting similar conduct elsewhere in its area of operations was reasonable and an allowable exercise of the Commission's judgment under the circumstances. *Maryland Baking Company* v. *Federal Trade Commission*, 243 F.2d 716, 718 (4th Cir. 1957). In that case, as in this, petitioner complained because the Commission had not limited the order to the area in which the unfair practice had occurred.[46] The court stated:

> As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices *in all areas* in which it was doing business [243 F.2d at 718, emphasis added.]

In *Foremost Dairies, Inc.* v. *Federal Trade Commission*, CCH 1965 Trade Cases ¶71,500 (5th Cir. 1965), Foremost, a dairy company operating a multi-state business from 50 plants in 24 states, engaged in price discrimination in the sale of milk "in the Alberquerque, New Mexico, market." The Commission in that case, as here, issued an order prohibiting such discriminations by Foremost wherever it sold milk.[47] On review Foremost, like

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[46] Continental seeks to distinguish *Maryland Baking* on the claim that Continental is not a firm with centralized pricing. However, as described, New York headquarters of Continental approves all major bread price changes by the many individual Continental bakeries. Membership in Bakers of Washington, Inc., moreover, was approved by New York headquarters (R. I, 304). No contention, of course, has been made that Continental could not institute any internal system for setting prices that headquarters desired. Absolute authority on prices exists in top executives of Continental in New York. Continental's claimed basis for distinguishing *Maryland Baking* thus has no cogency.

[47] Similarly in *United Biscuit Company of America* v. *Federal Trade Commission*, CCH 1965 Trade Cases ¶ 71,528 (7th Cir. 1965),

Continental, contended not only that no order at all should have issued but that, if any order was proper, it should have been limited to the Alberquerque, New Mexico, market. The court, however, affirmed the Commission's order prohibiting Foremost from unlawful price discriminations wherever it sold milk, stating:

> To limit the Commission to the entry of orders which are directed only to the specific violation found to exist would be not only unrealistic but also would frustrate the purposes of the Robinson-Patman Act.

Limiting the order in this proceeding, as contended for by petitioners, would likewise frustrate the purposes of the Federal Trade Commission Act. The Commission would be compelled to prove price fixing by Continental, for example, in many cases before such activities could be stopped in 65 cities and 32 states where Continental sells bread.

Petitioners cite a number of cases in their attempt to limit the geographic application of the Commission's order. But none of these cases bears on the permissible scope of an order in a price fixing case based on proof in a specific locality. The cases cited by petitioners all involved orders couched in generalized language, usually in terms of the statute itself, and hence have no pertinency to the order in this proceeding.

Continental and Langendorf cite *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426 (1941). Continental (brief, 39) not only misapplies the case but, in connection with it, misstates the facts in the instant proceeding. The price fixing shown in this record was a continuing practice over a long period, not "one local violation." *Express Publishing*, moreover, concerned

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the evidence showed price discriminations in the sale of "cookies and crackers." The Commission, however, issued an order applicable to all "food products." The order was challenged by United Biscuit as "too broad in its scope". The court rejected this contention finding that a broad order applicable to all food products, once a violation had been established as to a particular variety, was well within the discretion of the Commission.

the propriety of a general injunction to obey a statute issued on the basis of a violation by a specific type of practice. The locale of the violation was not involved. *Express Publishing* merely means that proof of price fixing would not justify in this proceeding a general order enjoining every violation of § 5 of the Federal Trade Commission Act.[48] But this principle has no bearing on the Commission's order in this case.

The Commission's order here is specific and precise, is not couched in the generalized language of the statute, and no problem exists as to what future conduct will violate it. The order prohibits price fixing on bread by petitioners in their marketing areas, and no ambiguity exists. *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962); *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962); *Giant Food, Inc.* v. *Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910; *R. H. Macy* v. *Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964); and *American News Co.* v. *Federal Trade Commission*, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824, all involved orders against discriminatory advertising allowances phrased in broad, essentially statutory language. Contrary to the precision of the order in this case, the Courts held they lacked specificity, and presented questions as to exactly what particular future conduct was prohibited. In *Swanee*, for example, the court noted that the language of the Commission's order was so general that the burden of enforcing § 2(d) of the Clayton Act, as amended, was shifted from the Commission to the federal courts. These cases thus have no resemblance at all to that in this proceeding, and the action of the courts in rendering general language of the order more specific does not support in

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[48] In fact, the Court in *Express Publishing Co.* specifically endorsed the principle that when one has been found to have violated the law he may be restrained from committing other related unlawful acts. 312 U.S. at 436.

the slightest the contention of petitioners as to the order here.

In *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), the Court noted that because of civil penalties Commission orders should be "clear and precise" to avoid raising serious questions as to their meaning and application. But, as stated, there is no problem here of clarity or precision, and no question exists as to the meaning and application of this order. Petitioners know exactly what is prohibited.

Petitioners also cite *Korber Hats, Inc.* v. *Federal Trade Commission*, 311 F.2d 358 (1st Cir. 1962), *Country Tweeds, Inc.* v. *Federal Trade Commission*, 326 F.2d 144 (2d Cir. 1964), and *Bankers Securities Corp.* v. *Federal Trade Commission*, 297 F.2d 403 (3d Cir. 1961). But again contrary to the situation here, unspecific, generalized orders against deceptive practices had been issued in those cases which the courts thought could raise questions of meaning and application in the event of future enforcement proceedings. In contrast to the cases cited by petitioners, *Maryland Baking*, *supra*, 243 F.2d 716, and *Foremost Dairies*, *supra*, CCH 1965 Trade Cases, are exactly in point constituting specific authority for applying an injunction against a practice found to exist in one marketing area to the other marketing areas of petitioners.

Furthermore, it is clear that the Commission can "close all roads to the prohibited goal," *Federal Trade Commission* v. *Ruberoid Co.*, *supra*, 343 U.S. at 473, and that "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Company*, *supra*, 352 U.S. at 431.

CONCLUSION

For the foregoing reasons the Commission's order to cease and desist is proper in all respects and should be affirmed and enforced.[49]

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[49] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 112, 15 U.S.C. 45(c).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL H. HANSCOM
Attorney

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